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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 87

RICHARD S. SIMPSON,
Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent's Brief

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 564-73) is reported in 311 F.2d 764. The opinion of the District Court (R. 347-60) is reported in 1961 Trade Cases ¶ 69,936, p. 77,693. A prior opinion of the District Court, denying a preliminary injunction (R. 42-4), is reported in 162 F. Supp. 746.

JURISDICTION

The judgment of the Court of Appeals was entered January 2, 1963 (R. 574). This Court's jurisdiction was invoked under 28

All emphasis in this brief added unless otherwise noted. The notation "Br." refers to "Petitioner's Opening Brief."

U.S.C. § 1254(1), and the petition for writ of certiorari was granted April 29, 1963 (R. 575).

STATUTES INVOLVED

The statutes invoked by petitioner are §§ 1 and 2 of the Sherman Act (Act of July 2, 1890, c. 647, §§ 1 and 2, 26 Stat. 209, as amended by the Act of August 17, 1937, c. 690, Title VIII, 50 Stat. 693) and §§ 4 and 16 of the Clayton Act (Act of October 15, 1914, c. 323, §§ 4 and 16, 38 Stat. 731). These statutes are partially quoted in Appendix A to petitioner's brief.

In addition, the following statutes are involved: The McGuire Act (66 Stat. 631, 15 U.S.C. § 45 (a)(2) and (3), § 5(a) of the Federal Trade Commission Act as amended by the Act of July 14, 1952); the California Fair Trade Act, Cal. Bus. & Prof. Code, §§ 16,900-16,905; California Petroleum Labeling Act, Cal. Bus. & Prof. Code §§ 20,840, 20,849, 20,850, 20,851; also Cal. Civil Code §§ 2026, 2027.

These are all quoted in the Appendix hereto.

QUESTIONS PRESENTED

1. a) Since a consignment agreement requires the consignor's agent, the consignee, to sell the principal's goods at prices directed by the principal, does it violate Section 1 of the Sherman Act for a manufacturer (here a gasoline refiner) to sell directly to the consumer by means of consignment? In other words, is the agent's agreement to follow his principal's price instructions on sale of the principal's goods a violation of Section 1?

b) Assuming, *arguendo*, that the answer to the foregoing question would otherwise be "yes", is not the answer nevertheless "no" because of the McGuire Act and the California Fair Trade Act (the locus of the events being California)?

c) The refiner possessing nothing even remotely resembling a monopoly of the gasoline business or of service station sites, does the refiner violate the Sherman Act by declining to lease

a service station except to one who agrees that any gasoline he obtains from that refiner will be handled by him as a consignee, i.e., an agent of the refiner?

2. a) Can one party to an agreement recover from the second party damages said to flow from the first party's own voluntary performance of the agreement on the ground that, *arguendo*, it violates the antitrust law? Specifically: During the time he was a consignee, a dealer ignored the prices specified by his principal for sale of its gasoline when he saw fit and charged those prices when it suited him. May he recover damages for supposed loss of profits claimed to flow from charging the specified prices on the occasions when he saw fit to charge them?

b) Absent a conspiracy, can a person demand that another lease real property to him on terms to be fixed by court or jury or pay him damages on the ground that the only terms on which the owner is willing to lease would be, *arguendo*, incompatible with the antitrust law? Specifically: may one recover damages for refusal of a gasoline refiner to lease a service station to him because, while he was a lessee under a former but expired lease, he violated the terms of a consignment agreement under which he received gasoline from it?

3. When a plaintiff has been given every opportunity in extensive pre-trial and discovery proceedings to formulate his contentions and assemble his case, assures the court that, in view of stipulations of fact by defendant given to him in response to factual contentions, there are no issues of fact and he has nothing to submit to a jury on liability, in response to defendant's showing on its motion for summary judgment makes no showing that any such issue exists, and himself moves for summary judgment, was the case not ripe for summary judgment?

4. Where the plaintiff in a private suit for damages under the antitrust laws is not engaged in interstate commerce, and neither the activities of defendant claimed to have injured plain-

tiff nor their impact on plaintiff occurred in interstate commerce, is application of the Sherman and Clayton Acts supported by the fact that the defendant engages in interstate activities?

STATEMENT OF THE CASE

The plaintiff and petitioner will be referred to as "Simpson" and the defendant and respondent as "Union".

While Simpson seeks relief under the antitrust laws, not only is there but one defendant but the case involves the conduct of that one acting alone. At an early pre-trial conference Simpson conceded (R. 369): "This is not a conspiracy case. This is a case of action and activities of a single defendant" (So also R. 395): And he repeated at subsequent hearings that "the complaint does not charge conspiracy" (R. 395). As observed by the District Court on deciding the case, "Plaintiff has conceded that the instant case involved the activities of a single defendant and that it is not a conspiracy action." (R. 354.) And, as we see at pp. 16, 64 below, this case involves no monopoly.

A. The parties and their relationship.

1. UNION AND ITS METHOD OF MARKETING ITS GASOLINE.

As observed by Simon N. Whitney, Chief Economist and Director of the Bureau of Economics of the Federal Trade Commission, there are three different ways in which refiners or suppliers of gasoline market their product.[1] One way is to sell directly at retail to the motoring public through wage-paid employees. Another is to sell directly at retail to the motoring public through consignees, that is, to sell through dealers engaged as commission-paid agents of the refiners. The third is to sell to retail dealers who resell to the public. Sometimes the dealer, whether consignee or purchaser,

1. Simon N. Whitney, Antitrust Policies (Twentieth Century Fund, New York, 1958), Volume 1, p. 126.

owns or leases the station from a third party, and sometimes he leases the station from the supplier.

Union is one of the very many producers, refiners and marketers of gasoline on the West Coast (see p. 17, infra). In order to develop outlets for its gasoline it has acquired a possessory interest (either the fee or a lease) in approximately 1335 service stations in California and 740 in eleven other states, and it markets its gasoline through these and through 2219 other stations in which it has no property interest at all; of the latter, 1030 are in California (R. 333, Br. 13). Except for 12 training stations in California and 2 in Washington, it does not operate any of the stations it owns or on which it has a lease but leases or subleases them.

Before 1955 Union's method of marketing its branded gasoline was by sale to retailers for resale by them. Late in 1954 Union contemplated a policy of consigning gasoline to dealers, in certain localities in certain situations, for sale by them as its agents (R. 223-230). But it never put that policy into effect. When in 1955 it finally did put consignment into effect, it did so as a permanent measure (R. 233), and by 1956 consignment had become the only method by which Union would market its branded gasoline through its own stations, that is, those on which it owned the fee or a lease (R. 278).[2] New lessees were taken on only as consignees, and as contracts of sale with former dealers expired, the custom of those not wishing to be consignees was given up (R. 278). By 1957 Union sold gasoline *to* only three dealers in California who leased stations from it (R. 334; also R. 199 at 200). It sold directly *to* consumers *through* its other dealers, as consignees.

As more fully detailed at pp. 13-15 below, under this consignment method of marketing Union remains the owner of the gasoline, and the consignee as Union's *agent* sells Union's gasoline. The dealer's reward is not a profit from resale with a risk of loss

2. This summarizes the series of directives reviewed in petitioner's brief at pp. 15, et seq.

but a guaranteed commission from Union. Since Union owns the gasoline and the dealer is merely its agent to sell, Union determines the price at which the gasoline is to be sold.

2. SIMPSON AND HIS RELATION TO UNION.

For about 8 years prior to 1956 Simpson had been one of Union's wage-paid employees. His last salaried position was that of its representative to its dealers in one district. As such he had discussed Union's consignment method of marketing with his immediate superior, read and became "pretty familiar" with the consignment agreement, and was Union's employee who presented and explained it to each of the 32 Union dealers in his district (R. 302-4).

He ceased to be an employee when he wrecked a company car and pleaded guilty to a charge of drunk driving (R. 424, 305). He then wanted to become a Union dealer and sell its gasoline, and Union was willing to lease to him an available station. At that time Union had a lease on a parcel of land in Fresno, California, bearing a gasoline service station (R. 37), and Simpson decided he wanted to sublease it from Union (R. 305-6). He knew that Union *would not sell gasoline* to dealers but would only consign (R. 63). With full knowledge of this fact and of the form of lease and consignment agreement he chose to take a lease of the station. He testified concerning the occasion when the documents were presented to him by Union's representative for his execution (R. 309):

> "A. Well, as I recall our conversation being two retail representatives one to the other, there was some conversation which is such as; 'Do I have to sign this crap?' And so on, and half-way jokingly and knowing that I had to. I mean as near as I can remember that is what it amounted to.
>
> * * *
>
> "Q. Can you recall anything else about that conversation respecting the signing of these papers?
>
> "A. No, not especially. It was all cut and dried. *I understood it then, and they knew I understood it,* as far as that is concerned."

May 23, 1956, by written lease, Simpson subleased the station from Union for a term of one year, subject to termination by Simpson (but not by Union) on 30 days' notice. In 1957 Union gave Simpson a new one-year lease ending by its express provisions on May 22, 1958.[3] Concurrently with the first lease, Simpson and Union executed a written Retail Dealer Consignment Agreement terminable by either party at the end of any year and ceasing, under paragraph "Eighth" (R. 101), on any termination of Simpson's right to occupy the station.[4]

April 1958 Union notified Simpson that it was terminating the consignment agreement at the end of its year (R. 36A, 36B) and would not offer him a further lease (¶ 25, R. 56). Thus all contractual relations between the parties expired by the terms of the contracts, on May 22, 1958.

B. The proceedings below.

May 21, 1958, "the day before his lease was to expire"[5] Simpson brought this action to enjoin Union from taking possession of its property and from leasing the station to anyone else (Prayer 5, R. 13), and obtained a temporary restraining order. June 3, 1958, the court denied an interlocutory injunction (R. 42), *Simpson v. Union Oil Company*, 162 F. Supp. 746, holding that both the lease and the consignment agreement had expired and that it could not compel the making of a new lease.

With the restraint of the restraining order thus removed, Union sued Simpson in a State court for unlawful detainer of the property and obtained a judgment adjudicating that at all times after May 22, 1958 Union was entitled to possession of the service sta-

3. The leases appear in full at R. 19-36; authenticated by Simpson at R. 199.

4. The consignment agreement appears in full at R. 95-102 and is authenticated by Simpson at R. 199.

5. So phrased, correctly, in petitioner's brief, p. 7.

tion.[6] Simpson then surrendered possession pursuant to the command of the State judgment.

He then amended his complaint in this action to seek damages in lieu of equitable relief (R. 46). Union moved for summary judgment (R. 60). Denying this motion in order to permit Simpson the opportunity to "throw more light upon the alleged claim" by further discovery and "without prejudice to its renewal at such time as more facts may become the predicate upon which a decision on the motion can be based" (R. 87-88), the court[7] observed that the "plaintiff's case is extremely thin".

The court then took control of the litigation and initiated a series of pre-trial conferences (R. 108). Although as the Court of Appeals below observed (R. 569), "to say the least plaintiff's contentions vacillated", they were finally pinned down, and to the end of eliminating possible issues of fact Union stipulated to facts claimed by Simpson. At the District Court's direction Simpson filed a "Pretrial Statement for Pretrial Ruling", in which he stated his contentions (R. 199) which was to supersede his complaint (R. 399). After extensive pre-trial and discovery[8] had sharpened and clarified the issues, Union again moved for summary judgment (R. 298). At the hearing (R. 407, et seq.) the court called on Simpson's counsel to specify what issues of fact he claimed remained. The colloquy (R. 412-35) ended with Simpson's admission that there were no longer any issues of fact tendered by him on the

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6. Exhibit B to Union's answer is a certified copy of the judgment (R. 105-6).

7. This was by a District Judge other than the judge who had denied the motion for interlocutory injunction. The eventual judgment was by still a third judge.

8. In addition to interrogatories and requests for admissions (e.g., R. 69, 111, 332) and inspection (e.g., R. 108, 212), Union took Simpson's deposition (R. 300, 452) and Simpson took six depositions, including those of the Chairman of Union's Board of Directors (R. 441), of its Fresno Division Manager (R. 343) and of three others (R. 493, 525, 539).

question of violation of law in view of Union's stipulations.[9] Thereafter Simpson himself moved for summary judgment on the issue of liability (R. 337-436). In due course his motion was denied, Union's was granted with an opinion (R. 347), judgment of dismissal was entered (R. 360) and was affirmed on appeal (R. 574).

C. Simpson's conduct under the agreement.

Before Simpson entered into the second one-year lease, he conceived the notion that a consignment agreement was illegal (R. 312). He could have terminated the consignment relation in any one of three ways: (1) By terminating the lease, as he could do by a 30-day notice whereupon the consignment agreement would terminate; (2) by notice at the end of the year (see p. 7 supra); or (3) by simply declining to receive gasoline from Union, since neither the consignment agreement (R. 95-102) nor the lease (R. 19-27) obligated him to take any gasoline from it. He was free to buy, sell or handle the products of anyone else. (See further discussion of this at pp. 13, 20, 21, infra.)

Simpson did none of these things. Although believing the consignment agreement to be illegal, he chose to sign a new lease thereafter in April 1957 (R. 312) and to continue with the consignment agreement. However, he then refused to abide by its terms and sold Union's gasoline at whatever prices he pleased in disregard of its instructions (R. 312, 313). As he says in his brief (p. 34) he "continued to establish market prices of his own judgment."

D. Simpson's claims.

Simpson asserted two *and just two* claims of injury.

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9. See further discussion of this at pp. 32-38, infra.

1. FIRST CLAIM—FOR $1000.

Paragraph 29 of the amended complaint asserts (R. 57) that Simpson was damaged in the sum of $1,000 because he was "unable to fix the prices of his gasoline during the period May 1955[10] to March 1958." His original complaint claimed that Union told him that he had to charge more than he wished to do (R. 11). When he amended his complaint to seek damages, he reversed this position, his claim being that Union wanted him to keep his prices down, as was made clear by his deposition.[11] There, in response to questions how he calculated the $1,000, he produced two computations (R. 319, 324-29), which assume that he would have sold at higher prices the same amount of gasoline he actually sold and that if he had been a purchase and sale dealer instead of a consignee he thereby would have made $1,000 more.[12]

2. SECOND CLAIM—FOR $150,000.

The second claim, stated in paragraph 30 of the amended complaint, asserts (R. 57) that Simpson was damaged in the sum of $150,000 because he was "unable to obtain a lease from the defendant for a reasonable period of time, was unable to sell or transfer his proprietary interests as a lessee to a successor of his own choosing, was prevented from selling his 'good will' and was prevented from obtaining the fair market value of his business".

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10. 1955 is an error. The date when he became a consignee was 1956, as noted in petitioner's brief at p. 7.

11. "A * * * The phone rings and the man tells me to put my price down. I hadn't noticed any reduction in business, there is no question I wouldn't have had my price lowered until there would have been some obvious effect in my business. You don't need to sell something cheaper than you have to until you find a need for it in my business." (R. 465)

12. One computation was entitled, "Minimum Margin Needed to Operate Profitably", and the other, "Supposing I Could Have Increased My Margin ½¢ Premium and 1¢ Regular".

This is but an overelaborate way of saying the same thing, namely, that Union would not give him another lease.[13] His figure of $150,000 was reached by assuming that he would have stayed in the service station for 15 years and estimating that he would have made a profit of $10,000 per year (Simpson's testimony, R. 313, 314).

Simpson contended that Union refused to give him a new lease on the expiration of his old lease on May 22, 1958 because of his violation of the consignment agreement (Complaint ¶¶ 24, 28; R. 56-57; Pre-Trial Statement, R. 203, 204, 210).[14] For the purpose of its motion for judgment, in order to bring the case to a sharp issue, Union stipulated that this is so.[15]

13. So far as "good will" refers to some value attached to a right of continued possession, there would be no good will to sell without a lease. So far as good will means some value not connected with a right of occupancy or a right to assign occupancy, it has never been claimed that Union either could or did prevent Simpson from selling whatever he legally owned. The lease granted to the lessee no right to choose the person to whom Union would lease the property after his term ended. Paragraph 9 (R. 35) provided that any attempt of the lessee during the term of the lease to assign it was grounds for immediate termination. *A fortiori*, the lessee had no interest which he could assign after termination. As the District Court below observed (R. 385):

> "The Court: I think a realistic appraisal of that situation indicates that there is nothing to sell, or there is nothing that is practically salable as a practical matter. You can't sell anything unless you can tie it in with the lease."

14. R. 204: "The defendant refused to allow plaintiff a renewal of his lease because he would not abide by the consignment prices fixed by defendant on his sales of gasolines to the public." This is repeated at R. 210.

So also, affidavit (R. 65): "I claim that the only reason that my lease was not renewed after May 22, 1958, was because of my attempt to set my own retail prices for Union Oil Company petroleum products as set forth in the complaint."

15. "Mr. Lasky: * * * For the purposes of this case and as a result of the pretrial conference we now come in and say he got no new lease, they declined to give him a new lease because he had violated the consignment agreement. Heretofore we have said to the Court we would argue the motion, any motion, upon that assumption. Your Honor asked us why we did not waive the other strings to our bow, [that] there were

3. THE PREMISE OF BOTH CLAIMS IS THAT CONSIGNMENT IS ILLEGAL.

It will be observed that the first claim is predicated on the fact that, during the period the consignment agreement existed, Simpson sometimes did abide by it, while the second claim is predicated on the fact that where it served his purposes he did not abide by it.

Both claims start with a premise that the consignment agreement was illegal as a price-fixing agreement. Obviously, Simpson cannot claim damages for having sold at prices required by a valid agreement or for Union's declining to enter into new contracts with a violator of a valid agreement.[16]

E. Simpson immediately obtained another station.

On receiving notice in April 1958 that he would not get a new lease from Union, he looked for no other station until the court, by its order of June 3, 1958, declined to compel Union to give him a new lease. He then bestirred himself (R. 314, 315). There being a multitude of service stations and competing refiners in California, Simpson speedily, on July 3, 1958, secured and went into possession of a General Petroleum service station in Fresno in partnership with another (R. 86, 321). During the period of his operation of the Union station, he showed average net earnings of $453.03 per month (R. 320, 322). During the first 13 months of operation of the General Petroleum station (up to the time of his deposition) he sold a greater monthly gallonage and showed

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other reasons we did not renew the lease. You said it would simplify the presentation of the case and therefore in the brief we have filed we have said for the purposes of this case we will now take the position we did not give him a new lease because he violated the consignment agreement. It is a conceded fact in the case that he did violate the consignment agreement because he refused to charge the prices which his principal, the Union Oil Company, prescribed for him to charge." (R. 409)

16. His brief (at p. 64) seems to suggest that for breach of a valid term of the agreement, Union's only remedy was to sue Simpson for damages, and that it had no right to refuse to enter into new contracts with him. Common sense would be startled to learn that there was such a rule of law.

an average net profit of $1,017.52 per month (R. 320, 323), or a profit to him of over $500 per month.

F. The provisions of the Consignment Agreement.

Since the core of this case is the consignment agreement, we state its terms more fully.

Denominating Union as Consignor and Simpson as Consignee, the consignment agreement provided that Union would deliver to Simpson such quantities of its branded gasoline as the parties might from time to time mutually agree upon (¶ "First", R. 95). It did *not* bind Simpson to take any gasoline at all from Union. It did not preclude him from buying or receiving gasoline from others and selling it. It merely specified the terms and the basis on which Union would supply and on which he would handle such gasoline as he saw fit to receive from it and it saw fit to deliver to him.[17]

The terms of the arrangement were that title to all gasolines delivered would remain in Union until sold by Simpson (¶ "Fourth", R. 100), and that Simpson would sell "Consignor's [i.e., Union's] gasolines" at prices authorized by it (¶ "Second (2)", R. 95) in return for which Union would pay Simpson a commission computed according to a certain formula (¶ "Third (2)", R. 99). Consistent with the fact that Union retained title, it was specified that Union would pay all property taxes on all gasoline in Simpson's possession (¶ "Third (3)", R. 100) and would stand all loss and damage resulting from fire, explosion (not caused by Simpson's negligence) as well as from earthquake, lightning, or flood (¶ "Second (6)", R. 97-98).

17. Paragtaph First of the Agreement reads (R. 95):

"First: Consignor agrees to deliver to Consignee and Consignee agrees to receive such quantities of Consignor's gasoline as Consignor and Consignee may from time to time agree upon for sale at Consignee's place of business at 4010 East Ventura Avenue, Fresno, California, on the terms and conditions hereinafter set forth."

Simpson was not obligated to pay for the gasoline but only to account for the proceeds when received (¶ "Second (7) and (8)", R. 98).[18]

Consistent with the fact of his agency, the consignee received a guaranteed commission. The basic commission was 1½¢ per gallon more than the amount by which the price at which Union authorized the consignee to sell (called the "authorized retail price") exceeded a reference figure called the "tank wagon price" (R. 99). But a minimum commission was guaranteed in two ways (¶ "Third (2)(a)(b)(c)", R. 99, 100):

1. When the price at which the consignee was authorized to sell fell to a specified base line, the commission did not continue to decline by the full amount of any further decline in the retail price but only by one-half of any further decline. Shortly before Simpson ceased to be a consignee, this was liberalized so that as the authorized retail price fell below a specified base line the consignee's commission declined by only 20% of that decline, and as the authorized retail price rose above the base line the commission increased by 80% of the excess (R. 281, 282).

18. His brief in this Court, (pp. 21, 63) contains the curious statement that the consignee paid Union for gasoline at the time of delivery. This is not so and is directly contrary to the record cited in support (R. 170-171, 80). When a gasoline tank was depleted and Union refilled it, consignee accounted for the proceeds of the gasoline that had theretofore been sold and was being replaced. Counsel would have it that this was payment for the gasoline newly delivered, but this contention confronts him with the oddity that there would be no accounting for the gasoline theretofore sold, and counsel hastens to argue (Br. 21) that "The only gasoline actually not paid for by the consignee was the initial gasoline stored at the service station when first occupied". The tanks on the premises held 13,050 gallons (R. 20), which would cost a dealer purchasing it over $3000. Simpson's assertion amounts to a statement that Union sold him this amount of gasoline in May 1956 and let two years elapse without seeking or obtaining payment. No such queer gap exists if the payments are not distorted but are treated just as the contract provides, as an accounting of proceeds for gasoline after sale by the consignee. Moreover, Simpson testified that he never bought gasoline from Union (R. 311).

2. It was further provided that "in no event shall said commissions be less than $.0595 [5.95¢] for each gallon of 7600 Gasoline and $0.575 [5.75¢] for each gallon of Royal 76 Gasoline" (R. 100). In September 1956 this was increased at Simpson's request (R. 312) to 6.6¢ per gallon of regular and 7.1¢ per gallon of premium (R. 103, 104). Simpson's brief states (p. 19) that in February 1958 Union decided to drop the guaranteed minimum from the contract.[19] This relates, however, to the second type of guaranty; moreover, it does not concern him because the new policy went into effect after he ceased to be a consignee in May, 1958. A change in agreed commission could not be effected with any current consignee without his consent until the term of his consignment agreement expired. While the new commission terms were to be written into new consignment agreements, it was stated that "minimum commissions will remain as at present for an indeterminate period of time" as to all consignees, until all old agreements ran out or were changed by mutual consent, and it was hoped that the new policy would become effective by April 1959 (R. 77, 285, 286).

Further discussion of the terms of the consignment agreement will be found in the Argument at pp. 51-58, infra.

G. The facts relative to other matters referred to in petitioner's brief.

Several other subjects are referred to in Simpson's brief, it seems to us largely, if not wholly, by way of epithet without logical pertinence to any relevant issue. We therefore state the facts about them here, leaving discussion to the Argument.

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19. Simpson's brief erroneously states (Br. 19) that there was a change in February 1958 and another (Br. 20) in April. The documents of February and April refer to the same change, those of February announcing it, and those of April giving explanation of certain points.

1. REFERENCES TO MONOPOLIZATION.

While the complaint refers to Section 2 of the Sherman Act and Simpson's brief speaks of "monopolization", the claim was withdrawn in the District Court. At the first pre-trial conference, Simpson's counsel admitted that his claim of monopolization "is the weakest part" of his case (R. 382). At the next pre-trial conference, the following colloquy occurred (R. 396-8):

"The Court: A few weeks ago I thought we had the monopoly question pretty well disposed of.

"Mr. Keith: Yes; *we do have monopoly disposed of. Monopoly as such is out of the case.* * *

* * *

"Mr. Keith: Well, *I will limit the charge of monopolization to what I just said. In other words, it is another choice of findings as to the consignment agreement, if you so want me to.*

"Mr. Lasky: * * * Let me see if I understand. * * *

"You do not contend in this case that there was a monopoly by the defendant, Union, and your contention with respect to monopolization is merely that by virtue of owning or holding leasehold interests in a certain number of service station sites and leasing them to people with whom the company also enters into consignment agreements, the company is guilty of attempted monopolization. Now, that's the contention?

"Mr. Keith: Consignment agreements which control prices which allow the company to fix prices.

"Mr. Lasky: I understand. You are talking about these consignment agreements?

"Mr. Keith: These consignment agreements. Plus interfering with sales of property and leasehold interests.

"Mr. Lasky: Well, now, you see, there again, now we get off the beam. We don't interfere with anybody. We give them a one-year lease. When the lease is over if we don't renew it, what does the man have to sell?

"Counsel has his argument, but—well, I understand his argument."

Thus the term "monopolization", as used by Simpson, does not relate to any *additional factual* element by which it is sought to make illegal what would otherwise be legal. It is simply a characterization applied to the consignment arrangement and Union's refusal to give a new lease to a violator.

Thereafter Simpson filed his "Pretrial Statement for Pretrial Ruling" (R. 199), which was to supersede his Amended Complaint (R. 399-406). *That document nowhere uses the words or charges "monopoly" or "monopolization".* Still later, at the hearing of February 11, 1960, where the District Court sought to pinpoint the issues, Simpson's counsel nowhere spoke of "monopoly" or monopolization" (R. 407-435).

As noted in *United States v. Standard Oil Company of California*, 1958 Trade Cas. ¶ 69,212 at p. 74,760, there were approximately 36,000 service stations on the West Coast. About 21,000 were either owned by dealers themselves or leased by them from third persons other than any of the seven defendants in that case of which Union was but one. The total number of retail outlets selling Union gasoline was about 3600 on the West Coast (R. 332).

In California about 2377 service stations sold Union's gasoline, but in only 1335 did Union have any property interest by fee or lease. About 21,000 other stations sold products supplied by Standard Oil Company of California, The Texas Company, Tidewater Oil Company, Shell Oil Company, Richfield Oil Corporation, General Petroleum Co. (Socony Mobil Oil), Wilshire Oil Company, Hancock Oil Company, Mohawk Oil Company, Douglas Oil Company, Bankline Oil Co., Caminol Co., Century Oil Co., Fletcher Oil Co., Newhall Refining Co., Sunland Refining Co. and many others (R. 38, 113). Union stations sold only about 11.5% of the total gasoline sold through service stations in California (R. 38).

There were at least 246 service stations in Fresno, California (the location of the station leased to Simpson), of which only 26 were selling Union gasoline, all in competition with stations selling the products of the various companies named above (R. 15-17, 113).

2. REFERENCES TO COERCION.

"Coercion" is a word bandied about in Simpson's brief. At pre-trial the following colloquy occurred (R. 379-380):

> "Mr. Lasky [Union's counsel]: * * * when plaintiff alleges that he was compelled to accept a one-year lease and he was compelled to accept a consignment agreement, does he mean anything more than this: That if he wanted to get a lease on this property and he wanted to handle Union products[19a] the only type of contract we would give him by which we would deal with him was a one-year lease and a consignment contract—if that is what he means when he says he was coerced into taking it, because if he didn't take that, we wouldn't deal with him, then I say those are the facts: Either he took our consignment contract and our lease or we wouldn't deal with him.
>
> "The Court: That is precisely what you mean by the word 'compel'?
>
> "Mr. Keith: *This statement is correct.*
>
> "The Court: And to the extent that that may be regarded as coercion, you will stipulate to that, is that right, Mr. Lasky?
>
> "Mr. Lasky: Why, yes. I don't stipulate it is coercion, but I say these are the facts.
>
> "The Court: If that constitutes coercion—
>
> "Mr. Lasky: Then we coerced him."

Thus the claimed "coercion" is no more than the fact that Union would deal with Simpson only on a consignment basis. This is further illustrated by the following subsequent colloquy (R. 423, 425):

19a. The word "and" improperly appeared here in the transcript.

"The Court: Where you enter into an agreement to take goods on consignment, you are under compulsion in the sense that you are using the term: That if you want to do business with the consignor you take the merchandise on his terms and that is the compulsion as I see it, that you are talking about.

"Mr. Keith: No.

"The Court: There is no compulsion or coercion, however, to take the agreement or operate under it?

"Mr. Keith: Well, in this particular situation—let's address ourselves to the facts here—* * * Mr. Simpson had an unfortunate highway accident. He had a few beers before the accident * * * and the next thing he knew he was no longer with Union Oil Company. But they appreciated the plaintiff and wanted him to have something from the company so they said he could have his pick of any Union Oil station in the State of California that was open. * * *
* * *

"The Court: What he had was an offer by the company to take whatever station he wanted to if he wanted it.

"Mr. Keith: Yes.

"The Court: And if he didn't want to take it he didn't have to.

"Mr. Keith: All right; but he was compelled, in order to lease that station, to take this consignment agreement—in order to lease that station.

"The Court: It is the word 'compelled' that bothers me a little bit. * * *
* * *

"The Court: How is it any different from the compulsion that is imposed upon a tenant who wants to rent an apartment and takes it on the conditions imposed by the landlord?

"Mr. Keith: It is just in this peculiar circumstance: He was a Union Oil man and he happened to have a good business opportunity, it is just one of those circumstances: He had a good opportunity with the defendant.

"The Court: If they wanted to give it to him."

3. REFERENCES TO EXCLUSIVE DEALING.

Simpson's brief speaks of "exclusive dealing" as demanded by Union of its dealers. The issue is spurious, since Simpson claimed no damage as flowing from any requirement of exclusive dealing (pp. 9-11, supra and p. 68, infra), and the charge is false. The facts are these:

"No lease or contract between Union and plaintiff required him to buy any products of the Union Oil Company of California or not to handle or sell products made by anyone else" (R. 38). There is nothing in the lease (R. 19-36). As we have seen (p. 13 supra), the consignment agreement did not even oblige Simpson to take a minimum quantity of gasoline from Union, much less require him to deal in its gasoline exclusively.

When the District Court brought the issues to a stipulated focus in February 1960, this occurred:

> "The Court: Where do you find [an] exclusive dealing requirement[20] in the facts of this case, and if it were an issue, where would you find your evidence to support that contention?
>
> "Mr. Keith: I was just going to say this, your Honor: I have interrogatories addressed to this point. * * *
>
> * * *
>
> "* * * On this question of exclusive dealing, it is going to be in these last interrogatories that are due now so that I can dispose of that.
>
> "The Court: *You mean it will either be admitted in the interrogatories or you will have no additional evidence to establish exclusive dealing?*
>
> "Mr. Keith: * * * *for the purpose of the disposal of this case I would submit it on the answers to the interrogatories addressed to them.*
>
> "The Court: All right.
>
> "Mr. Lasky: That is very well indeed." (R. 432)
>
> * * *

20. The reporter transcribed this as "Where do you find exclusive dealing a requirement", etc. The slight change above is obviously correct.

"Mr. Keith: Your Honor, I asked them to say if they knew of any station where there was a split-pump situation, and Mr. Haas indicated at the pretrial there weren't very many." (R. 434)

Thus Simpson stipulated that he would rest his claim of agreements between Union and its dealers that they would handle its gasoline exclusively on whatever answer he received to an interrogatory on how many "split-pump" accounts Union served. A "split-pump" dealer is one who sells the gasoline of more than one supplier. The answer was "one" (R. 336). This is the sum total of the "evidence". Its lack of any significance is discussed in the argument (pp. 70, 71, infra).

Despite his statement in the District Court that he rested solely on the answer to the one interrogatory, Simpson's brief now makes several statements on the subject, which are plainly incorrect. He states (Br. 18) that the written consignment agreement provides that the "dealer is to maintain the trademarks of Union on his pumps and other facilities through which gasolines are dispensed (R. 95)." The cited clause of the agreement (¶ "Second (1)", R. 95") did not so provide. What it provided was that the consignee will handle and sell "all *gasolines delivered hereunder* under Consignor's brands, trade-marks and names * * * and will maintain said brands, trade-marks and names on pumps and other facilities through which *said gasolines* are dispensed". This merely required that if he obtained Union's gasoline for sale, it had to be sold under Union's brands, and that the pumps and facilities through which Union's product was sold had to bear its brand. Exactly this is required by the California Petroleum Labeling Act, discussed at p. 23, infra.

Simpson's brief further asserts (p. 18) that "The dealer could not, under respondent's consignment agreement, repaint the whole station and dispense another company's gasolines at his station without ouster", and (Br. 26) he repeats that "Dealers were not

allowed, under the consignment agreement program, to handle the gasoline products of other companies and repaint the stations". There is no such provision in the consignment agreement or in the lease, *and no truth to these statements*. The record reference cited in support of them is R. 434-435. That is a statement made by Union's counsel[21] in argument that in order to handle gasolines of others, "You would have to repaint the whole thing"; but this was counsel's summation of an argument just made by him at length 4 pages earlier about the requirements of the California petroleum labeling statute, as follows (R. 430):

> "There is nothing in the consignment contract that requires the plaintiff to take any quantity of gasoline from us or to handle any quantity. What it says is that we will supply to him on consignment and he will handle on consignment as a consignee such amounts of gasoline as the parties from time to time shall determine. That is all it says.
>
> "Next there is the affidavit of Mr. Rath, not contradicted, that we never required the man to handle no one else's products.
>
> "Now this must be read in conjunction with the requirement of California State law. It is illegal in California for anybody to sell gasoline other than the brand that goes under the color of the pumps through which it comes and under the color of the station, or at least under the color of the pumps. This is the State law which prevents deceit.
>
> "This means that any consignee who has taken our station lease with our colors on it and our pumps, if he wants to sell someone else's gasoline would have to put in separate tanks and separate pumps bearing the proper colors of whatever brand he is selling.
>
> "Now very few people, although they have the right to do so, see any economic sense in maintaining two separate pumps and two separate tanks.

21. The writer of this brief.

"I could call those State Code citations to your Honor's attention, but they are in the Busjness and Professions Code."

These state statutes are part of the factual matrix and are therefore appropriately summarized here (and fully quoted in Appendix 1): Every gasoline pump and underground tank must be plainly labeled with the brand, trademark or trade name of the gasoline (Cal. Bus. & Prof. Code § 20840), no other brand of gasoline may be placed in the underground tank (§ 20849), no pump may be attached to a tank containing a brand different from that appearing on the pump (§ 20850), gasoline other than the brand appearing on the pump may not be delivered from it (§ 20851). This legislation was enacted to protect the public from fraud, deceit and substitution, *Serve Yourself Gas etc. Ass'n v. Brock*, 39 C.2d 813, 821, 249 P.2d 545 (1952).

H. The two major issues in the case.

The first issue is whether by anything it did Union violated the Sherman Act.

But assuming *arguendo* that it did is not an end of the matter of liability. The agreements between the parties terminated in May 1958. This is neither a criminal suit to punish Union for an alleged past violation of law nor a suit in equity by the Attorney General to enjoin the future practice of conduct thought to be illegal. "Plaintiffs are not the champions of any rights except their own"[22] and a private plaintiff has no standing to call for antitrust adjudications in the abstract (See cases cited at pp. 80, 81, infra). He can recover only if he has suffered actionable damage from past acts.

A second major issue, therefore, is whether Simpson suffered actionable damage. This is not a question of amount, for amount

22. Cardozo, J., in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583 (1936).

is not determinable on summary judgment, but whether any damage has been caused by any actionable conduct of Union—i.e., whether any conduct of Union assumed, *arguendo*, to be illegal was the cause of any damage.

The District Court held both (1) that Union did not violate the law, and (2) that Simpson suffered no actionable damage (R. 347-360).

In affirming the judgment the Court of Appeals "refrain[ed] from deciding" any question of violation "because it appears clearly on the record that Simpson suffered no actionable damage" (R. 565).

We shall discuss both issues, and first that of legality of Union's conduct, for we wish no unargued assumptions of illegality to color the case.

Summary of the Argument

I. With Respect to Ripeness of the Case for Summary Judgment for Respondent.

The case took the course urged by the Judicial Conference's *Handbook of Recommended Procedure for the Trial of Protracted Cases*. Discovery proceeded under the court's close supervision; there were numerous pre-trial conferences, wherein plaintiff had the utmost opportunity to formulate his contentions, the issues were focused, and in order to eliminate factual issues Union stipulated to facts claimed by Simpson. Not until Simpson assured the court that he had exhausted discovery, conceded that no questions of fact on the issue of violation of law remained, and himself moved for a summary judgment on liability, did the court grant Union's motion. (Pp. 32 to 38, infra)

II. With Respect to Whether Union Did Anything Violative of the Sherman Act.

1. Taken as a whole the case is this: Union, one of innumerable refiners of gasoline, appointed agents to sell its gasoline at its prices, leased its realty to its agents, and when one agent's lease expired, refused to give him a new lease because he had been a faithless agent. The Sherman Act has nothing to do with this set of facts. (Pp. 79, 80, infra)

2. The use of consignment is ancient, commonplace and widespread. A consignee is an agent, paid by commission. It is no more illegal for a vendor to fix the price at which it sells its own property through a commission-paid agent than through a wage-paid employee. This Court, in *United States v. General Electric Co.*, 272 U.S. 476 (1926), and in other cases, the courts of California, a variety of other courts, and the proposed Uniform State Antitrust Act have all therefore concurred that consignment is not illegal under the antitrust laws as price fixing. Union's consignment system was examined and recognized as legal in the Consent Decree in the West Coast Oil case, *United States v. Standard Oil Company of California*, 1958 Trade Cas. ¶ 69,212; 1959 Trade Cas. ¶ 69,399. As *General Electric* held, the fact that a principal uses many consignees is irrelevant to the question of legality. Cases on resale price maintenance agreements are irrelevant, since there was no sale by Union to a dealer and resale by him but a sale by Union to the consumer through the consignee. (Pp. 38 to 51, infra)

3. The terms of the Retail Dealer Consignment Agreement were plainly terms of consignment and not of sale. This very agreement has been described both by a California court and by a federal court in the West Coast Oil case, supra, as an agency contract. Its terms are similar to or identical with those repeatedly

described as consignment in *General Electric*, supra, and in other decisions of this and other courts. Under it Union retained title to the product and paid all personal property taxes on it, and Simpson assumed none of the risks and burdens of ownership, was not obligated to pay for the product, did not take risks of resale but merely accounted for the proceeds if and when received, assumed no risk of price declines, and was paid a guaranteed commission. (Pp. 51 to 58, infra)

4. Moreover, to assert that the agreement was not consignment but sale is footless, because, if a sale, the price provision was legal as a valid Fair Trade clause under the California Fair Trade Act and the federal McGuire Act. (Pp. 58 to 61, infra)

5. Despite their use as epithets in Simpson's brief, "monopolization", "coercion" and "exclusive dealing" are not issues in this case. In the District Court Simpson disavowed any claim of monopolization, as well he had to. Union was but one of over 16 refiners selling gasoline on the West Coast. Out of 36,000 service stations on the West Coast, only 3600 sold Union gasoline; out of 23,000 in California, only 2377 sold Union gasoline; of 246 in Fresno, only 27 did so. In only 1355 stations in California did Union have any proprietary interest. It would thus be absurd to say that Union monopolized either the gasoline business or service station sites. Indeed, by "monopolization" Simpson means only that Union attempted to control the sale of its own brand of gasoline. But the power one has over its own trademarked product is not the power that makes an illegal monopoly. *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956). Simpson concedes that if Union operated the same stations by wage-paid employees, selling the same gallonage, instead of selling through consignees, it would not be in violation of either Section 1 or Section 2 of the Sher-

man Act. Use of consignee agents does not convert legality into illegality. (Pp. 64 to 68, infra)

6. The claim of "exclusive dealing" is sham because (1) Simpson has claimed no damage from any supposed exclusive dealing requirement, (2) it would have been entirely legal for Union, as a consignor, to require a consignee to handle the principal's product alone, *Federal Trade Commission v. Curtis Publishing Company*, 260 U.S. 568 (1923), and for it, as a lessor, to limit the lessee's use of tanks and pumps to the lessor's product, *Federal Trade Commission v. Sinclair*, 261 U.S. 463 (1926), but (3) Union did neither. The lease contains no provisions on the subject. The consignment agreement not only did not preclude the consignee from handling the gasoline of any other supplier, it did not require him to take any gasoline from Union but merely required that such gasoline as he chose to receive from Union would be handled on consignment. Union further showed, under oath, that there was no other agreement, this was not denied by Simpson, and he explicitly rested his claim of exclusive dealing on the bare and simple fact that only one Union station was a "split-pump" station. But this is no evidence at all of any exclusive dealing requirement imposed by Union, for "split-pump" stations are unacceptable to the public and are recognized by service station operators as uneconomical to operate, particularly since state law requires separate tanks and pumps for every brand. (Pp. 68 to 72, infra)

7. By "coercion" Simpson meant only that he wished to occupy Union's property and sell its gasoline, knew that the only basis on which it would merchandise its gasoline at service stations which it owned or on which it had a lease was to sell it directly by the agency of consignees, and he accepted these terms in order to obtain a lease, because it would lease to him on no other basis. This is not "coercion." (Pp. 72 to 74, infra)

8. There was no illegality in the conjunction of lease and consignment, and the Consent Decree in the West Coast Oil case, supra, so recognized. Simpson's citations on tying agreements are not in point, for Union nowhere and nohow conditioned the sale or lease of any commodity, realty or service on the purchase or lease of any other. Its unwillingness to lease its realty to one who would not execute a consignment agreement was not a "tie-in", for, as noted above, the consignment agreement neither required the consignee to take any gasoline from Union nor precluded it from handling gasoline of others. Similarly, Union's refusal to give a new lease to one who had violated a consignment agreement in the past was not a tying agreement or any agreement at all. Reading of *United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (S.D. Cal.), a Section 3 Clayton Act case on which Simpson relies so much, shows that it lends no support for his contention that the conjunction of a one-year lease and consignment was illegal. (Pp. 75 to 79, infra)

III. With Respect to Whether Simpson Suffered Any Actionable Damage.

A private litigant must show more than that there was a violation of the antitrust laws. Clayton Act § 4 requires that the particular violation be the legal cause of the particular claimed damage. (Pp. 80, 81)

1. The claim of $1,000 damage, said to flow from "inability" to charge what he wished for gasoline, fails because Simpson was able to charge what he wished, as demonstrated by the fact that he did so when it suited him. Moreover, if the consignment agreement was illegal, Simpson was free to ignore it, and if he charged for the gasoline a price different from what he preferred, his conduct was his own. His argument, whether sound or unsound, that doctrines of *pari delicto* or consent are in-

applicable in antitrust cases is beside the point. Those doctrines, where applicable, defeat recovery for damages inflicted *upon* a plaintiff *by* a defendant. Here recovery fails because the alleged damage was not inflicted on Simpson by Union, but the cause was Simpson's own act in charging what prices he charged. No case ever held that where B performs a given conduct he then can recover damages from A therefor because he had agreed with A so to conduct himself by an agreement illegal under the Sherman Act or for any other reason. He who *does* an act is not wronged by it. The claim further fails because, while a holding that the consignment agreement was illegal would outlaw the agreement, it does not permit a court to create a different contract to put in its place. In consequence, the gasoline entrusted to Simpson by Union would merely have been in his possession as its gasoline without any right of disposition other than to return it. Even treating the agreement as one of sale to Simpson would not permit recovery of damages, because every element essential to determine *fact* of damage would be pure conjecture. While leeway is given a plaintiff in an antitrust suit in proving *amount* of damage, no room for speculation is permitted in establishing the *fact* of damages. (Pp. 81 to 88, infra)

2. The claim of $150,000 fails because any such "damage" was not caused by the consignment agreement and lease, either or both, however illegal they may be assumed to be, but by Union's refusal to give Simpson a new lease. Since a plaintiff cannot recover under the antitrust laws except for deprivation of a legal right, *Keogh v. Chicago N.W. Ry. Co.*, 260 U.S. 156 (1922), Simpson cannot recover for Union's refusal to give him a new lease of its property unless he had a legal right to a new lease. State law governs the right to an estate in realty, and the judgment in Union's unlawful detainer action against Simpson

in a California court is *res judicata* that under state law Simpson had no right to further tenure or possession. Federal antitrust law imposed no duty on Union to do what the state law did not require, viz., lease to Simpson for a further term. The fact that Union's reason for refusing to give Simpson a new lease was his past unwillingness to follow price direction is not relevant. The right to select whom one will deal with is so fundamental in our system that, absent monopoly, one may unilaterally refuse to deal with another for any reason whatever, including failure of the other to follow a course of conduct which it would be illegal to bind him to do by a mutual agreement. *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960). What the Sherman Act forbids are agreements and conspiracies, but the refusal of one party to deal further with another because the latter has refused to accede to the former's desires as to his conduct demonstrates absence of agreement. Consequently, innumerable decisions deny recovery for the refusal to deal. Otherwise manufacturers would become public utilities, and Congress has declined in the past to make them so. This being true of a refusal to sell, *a fortiori* one cannot be compelled to lease property to another whatever his reasons for the refusal.

Because the Court of Appeals suggested, although it did not hold, that there might be a distinction between the case of one who had been a Union lessee before it adopted the consignment method of marketing and that of Simpson who had never theretofore been a lessee and became one knowing that he had to be a consignee, Simpson debates the question whether "consent" will bar a private suit for damage under the antitrust laws. But no such general question is involved in this case or the reasoning of the Court of Appeals, since the lease and consignment, to which he consented, did not cause his damage. During their exist-

ence he could have repudiated them, if they were illegal; but, repudiating them, he could not continue to exercise rights he had acquired solely from them. *Ring v. Authors League of America*, 186 F.2d 637 (2 Cir. 1951), cer. den. 341 U.S. 935. It would be one thing to say that consent does not bar damage inflicted, it would be quite another to say that while successfully repudiating an arrangement for illegality one can nevertheless keep it alive for its specified duration for such advantages as it offers him. But Simpson's case here is even weaker than that. Here the duration of the lease and consignment ended by their terms and the efflux of time; Simpson cannot claim a right to a *new* lease by virtue of the fact that for a period in the past he had been a Union dealer solely by force of a now expired lease and agreement which he now claims were illegal. If in 1956, before Simpson ever became a lessee, he had declined to accept a consignment arrangement, plainly he could not have compelled Union to lease its property to him without a consignment agreement, or pay him damages, on any theory that consignment was illegal. The fact that he did enter into the consignment agreement and have a lease for a space of time did not enlarge his rights and entitle him to still further leases on other and different terms. (Pp. 89 to 101, infra)

IV. With Respect to Interstate Commerce.

No summary under this head seems needed since the entire argument appears in slightly over one page. (p. 102, infra)

Argument

I.

PRELIMINARY: RIPENESS OF THE CASE FOR SUMMARY JUDGMENT FOR RESPONDENT

The case took the course urged by the best thought on the handling of antitrust cases. It followed the admonitions of the *Prettyman Report* (13 F.R.D. 62) and of the Judicial Conference's *Handbook of Recommended Procedure for the Trial of Protracted Cases* adopted in March 1960 (25 F.R.D. 351). Discovery proceedings were had under the closest supervision of the court, and there were numerous pre-trial conferences resulting in stipulations. And not until Simpson assured the court that he had exhausted discovery, conceded that there were no questions of fact on the issue of violation of law, and himself moved for a summary judgment on liability, did the court grant Union's motion for a summary judgment. Although, as the Court of Appeals observed (R. 569), Simpson's contentions vacillated, nevertheless the issues of liability were finally focussed and stated to be issues of law, involving no issue of fact. His brief in this Court submits (p. 57) that "the determination of the issue of violation of the Sherman Act to the injury of petitioner * * * it is respectfully submitted, should be made in summary judgment."

While this Court has observed, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), that summary judgment is not usually appropriate on issues of motive, intent and conspiracy, it has also said that, with that caution, "summary judgments have a place in the antitrust field, as elsewhere", *The White Motor Company v. United States*, 372 U.S. 253 (1963). Here no conspiracy is charged (see p. 4), and on the issues of motive and purpose Union stipulated to the satisfaction of Simpson's counsel in order to eliminate quibble about possible issues of fact.

Simpson's counsel said at the first pre-trial conference (R. 378):

> "I say there are two issues in this case [on] the issue of liability: No. 1, the consignment agreement is unlawful on its face as a matter of law. And this, of course, I would have no objection to presenting in a pretrial form of partial summary judgment.
>
> "On the issue of whether or not the consignment agreement is coerced on unwilling lessees, this is a factual question * * *."

Thus Simpson submitted the case on the basis that there were just *two* issues as respects liability:

1. Whether the consignment agreement was unlawful on its face. This, he conceded, was a pure issue of law.

2. Whether the consignment agreement was coerced on unwilling lessees. This he first said involved a question of fact. But then occurred the colloquy (R. 379-80) quoted at pages 18, 19, supra. Simpson's counsel stated what factual situation he meant by the claim of "coercion", and Union then stipulated, for the purpose of its motion for summary judgment, that such were the facts. Consequently, at a following hearing, Simpson's counsel conceded that no issue of fact existed on the second question of liability. The District Court asked counsel to specify, in view of Union's stipulations:

> "just exactly what in the way of factual issue other than, perhaps the issue of damages, is to be presented to a jury in this case" (R. 412, 413).

In extensive discussion (R. 414-29) Simpson injected a new issue, about "exclusive dealing", but conceded that there was no issue of fact on the two contentions referred to above, legality of consignment and "coercion".

> "The Court: Those are the first two things you had in mind, Mr. Keith, and *I think they are both conceded in sufficiently definite form to eliminate those as issues.*
>
> "Mr. Keith: *Yes.*

"The Court: All right. Then we get to the third question of exclusive dealings.

"Let's hear what Mr. Lasky has to say." (R. 429)

Union replied that this

"would be an improper issue to let go to the jury for the reason that plaintiff has never claimed any damage flowing from an alleged exclusive requirement" (R. 429),[23]

and the Court asked Simpson's counsel what evidence of an exclusive dealing requirement he intended to rely on. Counsel replied that he would rest entirely on the answer he would receive to one interrogatory about "split pumps".[24] Thus the issues about "exclusive dealing" are also pure issues of law, viz., is "exclusive dealing" a relevant inquiry at all, and, if it is, is the sole evidence Simpson relies on any evidence at all to go to a jury?

During this pre-trial conference, Simpson's counsel momentarily —*but only momentarily*—raised a contention he had disavowed from the outset. He repeated that he charged no conspiracy but first sought to limit this statement to conspiracy between Union and any competitive company (R. 393). The District Court then asked (R. 393):

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23. "* * * He has specified where he was damaged. He has not said that by being required to take our product instead of something else he has been damaged. He has never said he wanted to take anybody else's product and wasn't permitted to do so. He has not said that because he refused to handle our product exclusively, we terminated the lease. Pardon me, we never terminated the lease; we never cancelled. It expired of its own effect and we declined to renew.

"* * * He begged me, in effect, to stipulate that the reason we did not renew his lease was because he violated the consignment agreement by not observing the price schedule we placed for the sale of our gasoline, and on that urging I so stated for the purpose of this case.

"Now, where does this exclusive requirement element get into this case?" (R. 431)

24. The colloquy on this is quoted at pp. 20, 21, *supra*.

"The Court: What is your contention in this case, Mr. Keith? Who are they supposed to have conspired with if not their competitors?"

Simpson's reply was that he did not raise any *factual issue at all* about conspiracy, but a legal argument, and finally he withdrew that argument as well. We quote:

"Mr. Keith: This is a question for the Court, your Honor. The Supreme Court in the Dr. Miles case concluded that Dr. Miles had forced, in effect, a conspiracy between all his retailers. Now, I don't want to take that issue from the Court if the Court wants to so find.

"It's not a conspiracy between competitors. But this is a legal issue, I don't want to be precluded from any determination the Court might want to find at any proceeding in this case. (R. 393-94)

* * *

"The Court (Interposing): * * * The last time we were here, Mr. Keith, you were quite certain that the face of the consignment agreement was the crux of your case.

"* * * Now, on the first possibility of an understanding of the theory on which you are going ahead we find some sort of a nebulous thought that perhaps there is a conspiracy between the dealers, the oil company and some other unidentified, noncompetitive groups.

"Mr. Keith: Well, of course, your Honor, I think this is a legal conclusion that is being asked. *This is not a fact at all.*

* * *

"The Court: What is your position in this case?

* * *

"Mr. Keith: Well, as I say, *the complaint does not charge conspiracy.* It says these contracts are in restraint of trade. If the Court desires to eliminate this issue, *I will eliminate the issue. The central issue here is contracts in restraint of trade and monopolization.*"[25] (R. 393-395)

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25. As we have seen (pp. 16, 17, supra), by "monopolization" he meant only a characterization of the consignment agreement and the leases.

Thus any claim of any kind of conspiracy was limited to one deducible, if at all, from the contracts themselves. In the words of the Court in *The White Motor Company v. United States*, 372 U.S. 253, 259, since "the gist of the case turns on documentary evidence", no trial is needed and summary judgment is proper. *Poller v. Columbia Broadcasting*, 368 U.S. 464, 467 (1962), quotes *Sartor v. Arkansas Natural Gas*, 321 U.S. 620, 627 (1944), for this Court's basic teaching on summary judgments: Litigants are not to be cut off from a right to jury trial *"if they really have issues to try"*. For this, *Sartor* invoked the analogy of the directed verdict. In *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.*, 147 F.2d 399 (2 Cir. 1945), cer. den. 325 U.S. 861, Clark, J. for the Court, affirming a summary judgment, said (p. 405):

> "Here the analogy suggested in *Sartor v. Arkansas Natural Gas Corporation* * * * of evidence which 'would require a directed verdict for the moving party' is useful. *But care should be taken to make the analogy as exact as circumstances permit; the ruling is to be made on the record the parties have actually presented, not on one potentially possible.* Hence the case here is as though defendant had offered plaintiff's admissions, and plaintiff had then rested, with no contradiction or rebuttal of any kind, and had made its own motion for a directed verdict or peremptory instruction."

(This is particularly apposite since Simpson did in fact move for summary judgment.) Thus, whether an issue of fact exists is not left to a champertous imagination but depends on what the parties in fact presented. This Court's 1963 amendments to Rule 56(e) of the Rules of Civil Procedure underscore the point. It added to that rule two sentences:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine

issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The reason for this addition to the rule, as stated in the Advisory Committee's notes to the proposed amendment in the *Report of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States*, was "to overcome a line of cases * * * which has impaired the utility of the summary judgment device."

As each issue is discussed in the pages to follow, it will be made clear that no factual issue on liability exists in the record. Indeed, we find nowhere in petitioner's brief any claim of a factual issue on liability. While his Question No. 4 (R. 3) refers to the right to a jury trial, and his brief concludes with a cursory paragraph (Br. 74-75) about it, he does not even there specify or identify any factual issue except "as to any consent of the petitioner to his causes of action here", whatever that means. To talk of right to jury trial is an emotional deflection. If there is a material issue of fact, a litigant is entitled to have it jury-tried; if there is not a material factual issue, there is nothing for a jury. *Marietta Page v. Tilford Work*, 290 F.2d 323, 324 (9 Cir. 1961), cer. den. 368 U.S. 875. Repeatedly the District Court inquired "just exactly" what "factual issue * * * is to be presented to a jury in this case", and was assured that there was none. For example, this colloquy occurred (R. 427):

"The Court: There are no more facts for you to develop, are there, except insofar as they relate to damages?

"Mr. Keith: From my point of view, not from the defendant's point of view. They are claiming there are all these facts on injury and damage. They say there is no dispute of the fact as to injury and damage. I say there is a dispute as to the fact unless—

"The Court: Only as to the amount of damages, because you say in the present posture of the case the injury is definitely established, and once the injury is established it

leaves only the question of damages in amount to be determined by a jury. Isn't that the only logical conclusion you can reach?

"Mr. Keith: You are right, your Honor, and if your Honor desires me to make a motion for summary judgment, I will * * *."

As the District Court said in its opinion (R. 347):

"Extensive pretrial proceedings before this court have eliminated all the factual disputes and defendant has stipulated to certain specific allegations of fact to facilitate disposition of this case on reciprocal motions for summary judgment."

II.

UNION DID NOTHING VIOLATIVE OF THE ANTITRUST LAWS

The basic ground on which it is claimed that Union's consignment method of marketing was illegal is that Union was guilty of "price-fixing" because it directed the price its consignee charged.

But if the service stations which sell Union's branded gasoline were operated by its wage-paid employees, no one would dream of contending that it was guilty of a price fixing violation of the antitrust law by setting a price at which its gasoline was sold at those stations. Simpson's counsel so conceded below.[26] And the Court will judicially notice that Standard Oil Company of California does exactly that in its Standard stations.[27] We think that the question

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26. "The Court: There is no argument about the proposition that if Union had operated this station or all of these stations directly through its own employees, they could fix any price they wanted to?

"Mr. Keith: No question about that." (R. 440)

27. In *United States v. Standard Oil Company of California, et al.*, 1958 Trade Cas. ¶ 69,212, p. 74,758 at 74,760 (S.D. Cal. 1958), the court noted that Standard "fixes the sales price of gasoline in these company-owned stations which, * * * for 1957, numbered 1156."

In *United States v. Standard Oil Company of California*, 78 F.Supp. 850, 854 (S.D. Cal. 1948), aff'd by this Court, 337 U.S. 293, it was noted:

"The Government does not question (indeed, it could not) the right of Standard Oil Company of California to operate its own stations and sell therein any product it manufactures or distributes."

of whether a consignment arrangement is illegal as price-fixing is nothing more than the question whether an owner of property, who may determine the price at which he sells it when sold by a wage-paid employee, is precluded from doing so when sold by an agent compensated on a commission basis.

In answering this question it is perfectly idle to cite cases, as Simpson does, for the principle that sellers may not conspire together to set their prices.[28] The present case involves no claim of a horizontal price-fixing agreement; that was made clear at the outset of the case (see p. 4, supra). It is also beside the mark to cite cases holding that, unless permitted by fair trade laws, one may not enter into an agreement with a purchaser fixing the prices at which he will resell the product which he has bought and thus owns.[29]

No more is Simpson aided by cases involving a combination of these situations, i.e., a horizontal arrangement to fix resale prices.[30]

The present case is like none of the foregoing. This is a case of a vendor determining the price at which it sells its own property. Union did not sell gasoline to Simpson and then seek to fix his resale price. He was not a purchaser from Union but its agent for the sale of its property.

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28. Such are the following cases cited by Simpson: *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940).

29. Such are *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911); *The White Motor Company v. United States*, 372 U.S. 253 (1963); *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *Federal Trade Commission v. Beech Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *Strauss v. Victor Talking Machine Co.*, 243 U.S. 490 (1917); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940).

30. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

A. Consignment Does Not Violate the Sherman Act.

The contract was made in California. There (as elsewhere) the terms "consignee", "factor", and "commission merchant" are synonymous, and a factor is one who, in the exercise of an independent calling and not as an employee, sells another's goods *as the other's agent. Cass v. Rochester*, 174 Cal. 358, 361, 163 Pac. 212, 213 (1917). Factoring or consignment is not a lawyer's manipulation of concepts but an ancient part of the common law;[31] consignment contracts providing that the consignee shall sell goods on commission at prices stipulated by the consignor are widespread in business. They have been commonplace in the petroleum business for decades, e.g., *Gulf Refining Co. v. Wilkinson*, 96 Fla. 664, 114 So. 503 (1927); *Texas Co. v. Higgins*, 118 F.2d 636 (2 Cir. 1941) (Learned Hand, J.), as they have been and are in many other lines, *Federal Trade Commission v. Curtis Publishing Co.*, 260 U.S. 568 (1923); *United States v. General Electric Co.*, 272 U.S. 476 (1926); *Ludvigh v. American Woolen Co.*, 231 U.S. 522 (1913); *Ford Motor Co. v. Benjamin E. Boone, Inc.*, 244 Fed. 335 (9 Cir. 1917); *Students Book Co. v. Washington Law Book Co.*, 232 F.2d 49 (D.C. Cir. 1956), cer. den. 350 U.S. 988.

In *United States v. General Electric Co.*, 272 U.S. 476 (1926), this Court directly held that consignment is not illegal under the antitrust laws as a price-fixing arrangement. There General Electric had 400 consignees in one class and 21,000 in another (p. 483). As there said (pp. 483-485):

> "* * * The question is whether, in view of the arrangements, made by the Company with those who ordinarily and usually would be merchants buying from the manufacturer and selling to the public,—such persons are to be treated as agents, or as owners of the lamps consigned to them under such contracts. * * *

31. 1 Blackstone Commentaries 427 (Lewis's edition).

"* * * The circumstance that the agents were in their regular business wholesale or retail merchants, and under a prior arrangement had bought the lamps, and sold them as their owners, did not prevent a change in their relation to the company. * * *

"* * * The validity of the Electric Company's scheme of distribution of its electric lamps turns, therefore, on the question whether the sales are by the company through its agents to the consumer, or are in fact by the company to the so-called agents at the time of consignment. *The distinction in law and fact between an agency and a sale is clear.*"

In a *First Tentative Draft of a Proposed Uniform State Antitrust Act* under consideration by the National Conference of Commissioners on Uniform State Laws, prepared for it by the "Legislative Research Center, The University of Michigan Law School," and said basically to "follow[s] the federal antitrust laws", the following comment of the draftsmen appear under the definition in Section 1(2) of "contract, combination, or conspiracy":

"This definition is designed to include within the Act all collusive arrangements regardless of form, sale, contract to sell, purchase, contract to purchase, lease, contract to lease, license, contract to license, trust, common selling or purchasing agent, pool, or holding company. *Consignment transactions have not been included: a principal is at liberty to control the price and other terms upon which his agent may dispose of his commodities or services.*"[32]

California Civil Code § 2026 (adopted in 1872) provides that

"A factor is an *agent* who, in the pursuit of an independent calling, is employed by another to sell property *for him*, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser."

32. Set forth in 1963 Trade Cases ¶ 70,199.

Section 2027 provides:

> "A factor must obey the instructions of his principal to the same extent as any other employee, notwithstanding any advances he may have made to his principal upon the property consigned to him * * *."

Included in the "instructions of his principal" that a consignee must obey are those respecting the price at which the owner's goods are to be sold. *Bare v. Richman & Samuels, Inc.*, 60 C.A. 2d 413, 140 P.2d 895 (1943).

As recently as February 1963 it was definitively held that a gasoline consignment arrangement does not violate the California Antitrust Act, "for it was lawful for a consignor selling through a consignee to fix the price at which he authorizes the consignee to sell the goods of the consignor." *Shasta Douglas Oil Co. v. Work*, 212 A.C.A. 640, 644,[33] 28 Cal. Rep. 190, 193 (hearing by California Supreme Court denied April 3, 1963). One of the cases cited in the opinion in the *Shasta Douglas* case in support of this statement is *Gonzales v. Derrington*, 10 Cal. Rep. 700, 717 (1961), which involved the nature of Union's consignment arrangement; there the court had held that Union's consignees are merely its agents.

Union's consignment system was also thoroughly examined in *United States v. Standard Oil Co. of California*, Civil No. 11584-C (S.D. Cal. 1958), the Government's antitrust suit against the seven largest West Coast oil companies which was pending from 1950 to 1959. After extensive pre-trial examination of the facts, the court there observed (1958 Trade Cas. ¶ 69,212, p. 74,758 at 74,760) that Union "places its gasoline on consignment" and "fixes the prices at which it should be sold", and thus, "title remains in Union until the gasoline is sold, and Union factors its gasoline at these stations." It then ruled that, regard-

33. The citation "A.C.A." is to Advance California Appellate Reports. The decision will in due course appear in 212 C.A.2d.

less of the outcome of a trial, it would not compel Union to terminate its consignment system or compel Standard Oil Company of California to cease selling through its employee-operated stations. Thereafter Union and other defendants in that case entered into a Consent Decree on June 19, 1959 (reported in full in *United States v. Standard Oil Company of California*, 1959 Trade Cas. ¶ 69,399, p. 75,522, et seq.) which specifically recognizes consignment agreements with service station dealers. By it the consenting defendants were required to give three year supply agreements to dealers who wished them,[34] and that requirement is satisfied by the supplier's entering into a consignment contract with the dealer whereby the dealer sells gasoline at prices set by the supplier. While this decree is not *res judicata* as respects Simpson, since he was not a party to the case, it is significant, because the Antitrust Division of the Department of Justice and the United States District Court, in a suit designed to remedy supposed evils in the oil industry, would never have provided for retail consignment agreements if those agreements were thought to be proscribed by the Sherman Act.[35]

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34. Simpson had ceased to be a dealer over a year before this Consent Decree went into effect.

35. Paragraph XII(A) of the decree requires each consenting defendant to the decree to offer a "supply agreement" to its "dealers". Paragraph II defines each of the terms. Paragraph II(o) provides that

> "'Supply agreement' shall mean an agreement of purchase and sale *or a consignment contract.*"

Paragraph II(d) provides that

> "'Dealer' shall mean any person who is engaged *as a consignee or reseller* in the business of selling gasoline at a place of business serving highway automotive vehicles of the general public * * *."

"Consignee", "consignment contract" and "reseller" are defined as follows in Paragraph II:

> "(b) 'Consignee' shall mean a person who, *in the pursuit of an independent calling* and not as an employee, is engaged by a consenting defendant *as its agent* to sell any of said defendant's refined petroleum products *for it and at a price designated by it*, and is

In *Standard Oil Co. v United States*, 337 U.S. 293 (1949), where this Court invalidated Standard of California's practice of selling to dealers under total requirements contracts, the Court's opinion observed that before Standard had adopted that method of marketing its method was to sell through independent service stations *under agency agreements*, and that if Standard's requirements purchase arrangements were declared invalid, it would probably either return to the agency arrangement or make further use of the method of operating stations by wage-paid employees. And it was recognized that either of these methods, so long as Standard did not reach the point of monopolization, would be legal.[36] And for that very reason Mr. Justice Douglas dissented

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vested by said defendant with possession or control of the product and authorized to receive payment from the purchaser."

"(c) 'Consignment contract' shall mean a written agreement by which a consenting defendant engages a person to act as its consignee."

"(n) 'Reseller' shall mean any person who buys a refined petroleum product for resale, insofar as said product is concerned. As to any refined petroleum product which such person may handle *under consignment contract* or other arrangement not involving a purchase and resale by him, he is not deemed to be a reseller."

Paragraph XII(F) refers to "commission rates" provided for in a supply agreement.

36. "Before 1934 Standard's sales of petroleum products through independent service stations were made pursuant to agency agreements, but in that year Standard adopted the first of its several requirements-purchase contract forms, and by 1938 requirements contracts had wholly superseded the agency method of distribution." (p. 296)

"Having adopted this standard of proof, the court excluded as immaterial testimony bearing on 'the economic merits or demerits of the present system as contrasted with a system which prevailed prior to its establishment and *which would prevail if the court declared the present arrangement [invalid]*' " (p. 298).

"Before the system of requirements contracts was instituted, Standard sold gasoline through independent service-station operators as its agents, and it might revert to this system if the judgment below were sustained. Or it might, as opportunity presented itself, add service stations now operated independently to the number managed by its subsidiary, Standard Stations, Inc. From the point of view of maintaining or extending competitive advantage, either of these alternatives would be just as effective as the use of requirements contracts, although of course insofar as they resulted in a tendency to monopoly they might encounter the antimonopoly provisions of the Sherman Act." (p. 310)

from the decision. He felt that to outlaw total requirements contracts with vendees would lead Standard to bypass the middlemen by discontinuing selling *to* dealers and adopting a system of selling directly to the motorist *through its own employees or through consignees*, either of which would be legal (p. 320).

Prior to the *General Electric* case, in *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911), the case where the Court first held resale price maintenance agreements to be violative of the Sherman Act, the Court plainly recoginzed that this rule had no reference to one's rights to sell through consignees.[37] After the *Dr. Miles* case and before the *General Electric* case, the Fifth Circuit in *Cole Motor Car Co. v. Hurst*, 228 Fed. 280, 283 (1916), cer. den. 247 U.S. 511, and the Ninth Circuit in *Ford Motor Co. v. Benjamin E. Boone, Inc.*, 244 Fed. 335 (1917), both considered and upheld the consignment method of merchandising against antitrust attack. In the *Cole* case the court had said, "Surely the Cole Company had the right to determine that its agents should sell its cars at its own price." (p. 284) The *Boone* case contains an exhaustive opinion on the subject; the court there said, among many other pertinent things,

> "Admittedly the plaintiff has the right to sell its cars where and to whom it may choose, and for such price as it

37. The agreement held to be illegal in the *Dr. Miles* case sought to require wholesalers to sell, at prices set by the manufacturer, not only the goods consigned to them *but goods purchased by them as well*. As stated by the Court:

> "[The bill] * * * does not allege that the goods procured by the defendant from 'wholesale agents' were goods consigned to the latter for sale. [p. 397]
>
> * * *
>
> "It is * * * a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers * * *" [p. 399]
>
> "The agreements are designed to maintain prices, after the complainant *has parted with the title to the articles* * * *" (p. 407).

may see fit: *It may decline to deal with the trade at all, and, dispensing with middlemen, sell directly to users, by mail, or through traveling salesmen or local agents.* Accordingly it may lawfully appoint an agent * * * authorized to sell its cars, limiting his authority to sales * * * for a fixed price; * * *.

"The intent of the parties is clear enough, and the only question is whether effect can be given to such intent. * * * what public interest would be subserved by striking down the contract and thwarting the intent of the parties thereto? * * * it would be entirely possible for the plaintiff to accomplish all the objects which it seeks under the present plan, by marketing its product through its own agencies, so constituted that there could be no doubt that its salesmen were its agents merely, and not vendees. * * * plaintiff has no monopoly of the automobile business, but only of one out of almost innumerable kinds of cars, all differing in detail one from the other, but of the same general type and all designed to be used in the same general manner, and for the same general purpose. * * *" (p. 340)

Simpson repeatedly cites *United States v. Richfield Oil Corporation*, 99 F.Supp. 280 (S.D. Cal. 1951), aff'd 343 U.S. 922 (1952), as holding that all gasoline service station lessees are buyers whose prices cannot be fixed by the supplier. The case held no such thing, for it involved service station operators who *bought* and then *resold*. As the court carefully pointed out (99 F.Supp. 280, 289):

"The operator pays for his gasoline and the petroleum products *sold* to him by Richfield. *They are not merely consigned to him.*"

CONSIGNMENT DOES NOT CEASE TO BE LEGAL BECAUSE THE CONSIGNOR HAS MANY CONSIGNEES.

Simpson contends (Br. 65) that if a consignment agreement with one dealer is legal, illegality enters if there is more than one such agreement or a large number of them. Nothing in

reason supports this contention. The antitrust laws do not limit a vendor to one agent. *United States v. General Electric Co.*, 272 U.S. 476 (1926), not only upheld the legality under the antitrust laws of consignment but dismissed as irrelevant the fact that there were many consignees instead of one or a few. There, as noted, at p. 40 above, General Electric had 400 consignees in one class and 21,000 in another. The Court rejected as without merit the very argument Simpson makes, which the Court described thus (p. 485):

> "But it is said that the system of distribution is so complicated and involves such a very large number of agents, distributed throughout the entire country, that the very size and comprehensiveness of the scheme brings it within the Antitrust law."

It follows that nothing derogatory can be deduced from the fact that the consignees charge the same price.[38] The antitrust laws do not prohibit one from selling through all his agents at the same price. Indeed, if he sold at different prices through different agents in the same market he might be in violation of the Robinson-Patman Act.

If selling through consignees is to be outlawed, it is for Congress to do so. The subject has been studied by a sub-committee of the House (See R. 112-178), and no prohibition has come forth; it cannot be found in the Sherman Act.

ANSWER TO OTHER ARGUMENTS OF SIMPSON ON CONSIGNMENT.

Simpson cites two recent decisions of the Federal Trade Commission involving supposed consignment, *Sun Oil Co.*, Docket

38. While in places Simpson's brief suggests that Union directed all consignees to charge the same price, in his pretrial statement he stated that Union's prices varied between cities and between zones within a city (R. 207).

6934[39] and *Atlantic Refining Co.*, Docket 7471.[40] In neither case did the Commission challenge or doubt the legality of consignment. Concurring in the *Sun* case, Commissioner Anderson said:

> "I concur in the result. I am not sure that the majority opinion spells out in positive fashion the assurance that the time-honored business practice of consignment selling is not interdicted. It should be clearly understood that the general practice of consignment selling is not attacked by the Commission because of the practices of respondent in this case. This case should stand for this case only.
>
> "Consignment selling is a lawful business method. I don't think it is necessary for the Commission to take business enterprisers on its lap and explain how honest 'consignment selling' should be carried on, but it should at least say that the practice is not generally condemned."

The basis of the decision in the *Sun* case was that Sun Oil did not of its own decision adopt consignment but did so in conspiracy with its purchase and sale dealers as a result of mass meetings with them to determine how to end a price war. The Commission's opinion states:

> "Thus respondent's consignment contracts were not separately and individually negotiated with each of its dealers. Rather the dealers were called together in groups. Sun then acted as a necessary conduit and clearing house through which the dealers among themselves and in each other's physical presence could and did pledge to fix prices *horizontally*; Sun, in the presence of the dealers, pledged to fix prices *vertically*.
>
> * * * Sun, unlike *United States v. General Electric Co.*, 272 U.S. 476 (1926), did not content itself with unilateral vertical arrangements but instead joined with its dealers in horizontal arrangements * * *."

39. 1963 CCH Trade Reg. Reporter ¶ 16,418.

40. 1963 CCH Trade Reg. Reporter ¶ 16,422.

Whether the evidence in the *Sun* case warranted that conclusion does not concern us here. Here, there was no such arrangement among Union and its dealers. No conspiracy here was charged. No claim was made by Simpson that he had evidence of any such arrangement. As we saw at pp. 34-36, supra, at one point in the pre-trial conference Simpson's counsel spoke of deducing a horizontal conspiracy among Union and its dealers but (1) he explicitly stated that this was *not* a question of fact, on which he would proffer evidence, but that if he made the argument it would be solely as a legal deduction from the fact that Union had consignment agreements with numerous dealers, and (2) he then withdrew the contention. Obviously, the deduction is unsound.

In the *Atlantic Refining* case,[41] the Commission's main finding was that Atlantic conspired with its wholesale distributors, who were purchasers and not consignees, to fix retail prices, and that it used consignment to dealers as part of this overall conspiracy. Secondarily, it found a difference between the *General Electric* case and the facts before it, in that Atlantic did not actually make its dealers its agents, it did *not* adopt consignment *as a regular and permanent marketing method*: the regular method continued to be outright sale to the dealers, and Atlantic shifted back and forth to an alleged consignment in price war situations. Said the Commission:

> "There is a clearcut distinction between the facts presented by the *General Electric* litigation and the instant matter. * * * * * * *
>
> "* * * there is a wide difference between General Electric's permanently implemented and universally applied agency distribution of products produced under its patent and the activity of the respondent as demonstrated by this record. * * * * * * *

41. The *Atlantic Refining* case was a decision of but two commissioners. Two others did not participate, and Commissioner Elman did not concur.

> "Unlike General Electric, the agency distribution program *was not respondent's regular method of selling its products*. The system is only used at irregular intervals and in certain markets during price wars. The temporary nature of the program and the shifting back and forth of customers from dealer status to so-called agency status, emphasizes that the consignment plan is a device to fix and stabilize prices, rather than a good faith marketing method." [1965 CCH Trade Reg. Reporter, ¶ 21,289]

Moreover, when there was a temporary shift to supposed consignment, the dealer was not paid for the stock of gasoline he had already bought.

By contrast, *Union's method* is like that in the *General Electric* case, a *permanent and universally applied method of distribution.* In the *Atlantic* case the Commission thought a number of provisions — not present in Union's arrangement — inconsistent with consignment; for example, the dealers commingled money from the sale of gasoline with their receipts from the sales of products other than gasoline (p. 21,289). The Union consignment agreement provided, on the contrary (¶ "Second (8)", R. 98):

> "He [consignee] will retain the gross proceeds received from the sale of said gasolines and any other funds belonging to Consignor in his safekeeping, and transmit the same directly to Consignor at such times and in such manner as Consignor may from time to time require. Such funds and proceeds shall be segregated from and not commingled with other funds." (R. 98)

The Commission in the *Atlantic* case cited, and Simpson relies on, *United States v. Masonite Corp.*, 316 U.S. 265 (1942), but Masonite involved a conspiracy among competitors.[42] Union's con-

42. Masonite and 9 competing manufacturers (p. 267) entered into a horizontal agreement to fix the prices of their respective products through the use of identical agency agreements. Following patent disputes Masonite entered into the same kind of arrangement with each of the competitors,

signees were *its agents*, not its competitors. As co-agents of the same principal, they were no more competitors of each other than salesmen of the same employer paid on a commission basis. Simpson's argument becomes even more untenable as it is pressed. The consignee-dealers, he says (Br. 66), compete with companies who buy gasoline from Union and with other major refiners. But Union would not be denied the right to set the price at which it sells gasoline at retail, if it sold through wage-paid employees, merely because it sold gasoline at wholesale to some competitors and competed with still others. That it uses commission paid agents is not a relevant difference.

B. The "Retail Dealers Consignment Agreement" Was a Consignment Agreement.

There is argument in Simpson's brief that the document called "Retail Dealers Consignment Agreement" was not a consignment agreement at all (pp. 62-65). *It should first be noted what Simpson means by this contention.* He does *not* contend that evidence would show that the arrangement between the parties was something other or different from what provisions of the written document show. What he means is that the terms of the written agreement are terms of sale and not terms of consignment. In the District Court Simpson stated that his attack on the legality of the arrangement was confined to the arrangement as shown by the documents. Quoting again part of what we quoted at page 33,

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each knowing that Masonite proposed to make substantially identical agreements with all, and the several agreements being placed in escrow to become effective only when all had agreed to them (p. 270). Masonite limited its own freedom of action by binding itself to adhere to the prices in its own sales which it fixed for the others (p. 271). This was a clear conspiracy within the *Interstate Circuit* doctrine (p. 275). The Court's emphasis was on the fact that the agreements were entered into between competitors, "and that the purpose is to fix prices at which the competitors may market the product * * *" (p. 279). "In this case, the price regulation was based on mutual agreement among distributors of competing products, some of whom had competing patents, as we have noted" (p. 280).

supra, Simpson's counsel stated at the pre-trial conference (R. 378):

> "I say there are two issues in this case [on] the issue of liability: No. 1, the consignment agreement is unlawful on its face as a matter of law. And this, of course, I would have no objection to presenting in a pretrial of partial summary judgment."

And this is the position taken in Simpson's brief in this Court.[43] This, of course, is simply a question of contract interpretation, which is a pure question of law since the agreement is in writing.

From the outset the case proceeded on the basis that the contract was exactly what it calls itself, one of consignment. Thus Simpson swore in an affidavit

> "that at all times from the period May, 1956, to May, 1958, the defendant in the above-entitled action placed me under a consignment method of selling gasoline" (R. 63)

and that

> "Union Oil Company paid me on a consignment commission basis" (R. 64).

He stipulated that it was *"defendant's [Union's] gasolines"* that were being dispensed under *"consignment agreements"* (R. 61), and he testified on deposition that he never *bought* gasoline from Union *"because it was on consignment"* (R. 311).

The agreement is ineluctably a consignment agreement. Since we digested its terms, with record references, at pp. 13-15, supra, we merely recapitulate here.

The agreement is wholly different in its nature and its legal and economic consequences from one of sale and purchase. A buyer takes title. Simpson did not. A buyer takes the risk of ownership.

43. Thus his brief (p. 62) asserts that, "It is manifest from the provisions of the consignment agreement that Union has not kept the risks of ownership * * *."

Simpson did not. A buyer is obligated to pay for the product whether he sells it or not. Simpson was not. The agreement not only provided that ownership of all gasoline would remain in Union until sold by Simpson, but it placed the burdens and risks of ownership on Union. It, not Simpson, was to pay all *property taxes* on gasoline while in Simpson's custody.[44] It, not he, was to be responsible for loss or damage to the gasoline from fire or explosion (not caused by his negligence) as well as from earthquakes, lightning or flood. Simpson (Br. 70) tries to distinguish the *General Electric* case on the ground that General Electric assumed the risks of price decline and carried whatever insurance on the goods was carried. But so did Union. A purchaser is liable for the agreed purchase price, which is determined at the date of delivery of the goods to him, and he remains liable even though its value falls before he sells it. Such was not the case with Simpson under the consignment agreement. Under ¶ "Second (7) and (8)" (R. 98) his obligation was to account for the proceeds of the gasoline only when sold. Thus no risk of decline was on him, and Union assumed all the risks of the kind against which one might wish to insure.

Simpson asserts (Br. 63) that "the consignee had to absorb a substantial portion of price declines" or "a portion of the decrease in market prices". It is a rare thing for compensation on a commission basis not to be geared to proceeds; that is the very nature of commissions. But there was a world of difference between the consignee's commission and the chances of profit of a dealer buying and reselling gasoline. The latter's gross profit is the difference between what he pays and his resale price and decreases or increases by the whole of any drop or rise in the resale price. By virtue of the Union's commission formula, the consignee's

44. A contrary statement at p. 70 of Simpson's brief is patently mistaken. So is a statement on p. 19 that the consignee was to pay for insurance on stored gasoline; there was no such provision.

commission did not fall by the whole of any decline in retail price. A complete commission schedule covering a wide range of possible retail prices appears at R. 82-85 showing what commissions would be after the removal of the guaranteed minimum. It will be seen, for example, that as the retail price dropped to 10¢ below the base line, the commission declined by only 2½¢ (from 7¢ to 4½¢) (R. 84). So long as Simpson was a consignee, he was, moreover, protected by a guaranteed floor, originally 5.95¢, and later 6.6¢, per gallon on regular and originally 5.75¢, and later 7.1¢, per gallon on premium gasoline (see page 15, supra). Simpson's remuneration was not subject to the risks of the market place that a buyer for resale must suffer. He was not obligated to pay for the gasoline but only to account for the proceeds when received. He did not have to rely on ability to resell at a profit. He was guaranteed a commission, he was well aware of the guaranty, and he knowingly availed himself of it. Thus he testified (R. 471):

> "Q. * * * throughout the period of this price war that you have told me about, in October, you were receiving the guaranteed commission, were you not, 6.6 and 7.1?
>
> * * *
>
> "And it didn't make any difference to what price the retail price, to what level, the retail price fell, you still got 6.6, 7.1 gross at that time?
>
> "A. Yes."[45]

The reality of this very guarantee is a fact on which the court commented in *United States v. Standard Oil Company of Cali-*

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45. Simpson asserts (Br. 21) that when the consignee accounted to Union for the proceeds of its gasoline after sale by him, after deducting his commission, "ordinarily the dealer will thus pay respondent the same price as he would if he had bought at respondent's tankwagon prices." This is plainly incorrect. Furthermore, a dealer buying for resale could run up his retail price as far as the public would stand. A consignee could not, for any unauthorized increase by him would not increase his commission, since the whole of the "unauthorized add-on" had to be accounted for to the consignor (R. 70).

fornia, 1958 Trade Cases, ¶ 69,212 (S.D. Cal.), when it noted that some 1200 dealers who owned their own stations and were not dependent on Union for leases nevertheless chose to be Union consignees. Said it (p. 74,760):

> "* * * The factoring setup may provide a security for these dealers which they find more desirable than the rough and tumble of operating their own business."

Simpson argues that the agreement made him accountable in case of loss from causes other than fire, explosion, earthquake, lightning and flood, but in *United States v. General Electric Co.*, 272 U.S. 476 (1926), this Court rejected an identical argument. There the agreement provided that

> "the agent is to pay to the company the value of all of the company's lamps lost or missing from or damaged in the stock in his custody. * * * the company has assumed all risk of fire, flood, obsolescence, and price decline, and carries whatever insurance is carried on the stocks of lamps in the hands of its agents, and pays whatever taxes are assessed. This is relevant as a circumstance to confirm the view that the so-called relation of agent to the company is the real one." (pp. 482, 483)
>
> * * *
>
> "We find nothing in the form of the contracts and the practice under them which makes the so-called B and A agents anything more than genuine agents of the company, or the delivery of the stock to each agent anything more than a consignment to the agent for his custody and sale as such. He is not obliged to pay over money for the stock held by him until it is sold. * * * *There is no conflict in the agent's obligation to account for all lamps lost, missing or damaged in the stock. It is only a reasonable provision to secure his careful handling of the goods entrusted to him.*" (p. 484)

Simpson also argues that under para. Second (3), (4) and (5), (R. 95-96), he was to pay his own income taxes and all taxes and

contributions measured by the wages paid *his* own employees and the expense of conducting his business, including license fees (Br. 63). But this is simply related to the fact that he was conducting *his own* business, i.e., that of a consignee. There is no inconsistency between being an independent businessman and being an agent. As we have seen (pp. 41, 43, supra), both California Civil Code § 2026 and the Consent Decree in *United States v. Standard Oil Company of California*, supra, define a consignee as one who "in the pursuit of an independent calling" is engaged by another as his agent to sell property. Provisions like those in the agreement here are common to consignment agreements. In the *General Electric* case, supra, the agreement provided that (272 U.S. 476, 482):

> "* * * The agent is to pay all expenses in the storage, cartage, transportation, handling, sale and distribution of lamps, and all expenses incident thereto and to the accounting therefor and to the collection of accounts created."

This Court said:

> *"We find nothing in his agreement to pay the expense of storage, cartage, transportation (except the freight on the original consignment), handling and the sale and distribution of the lamps, inconsistent with his relation as agent.* The expense of this is of course covered in the amount of his fixed commission. The agent has no power to deal with the lamps in any way inconsistent with the ownership of the lamps retained by the company. When they are delivered by him to the purchasers, the title passes directly from the company to those purchasers." (p. 484)

In *Texas Co. v. Higgins*, 118 F.2d 636 (2 Cir. 1941):

> "* * * Thomas agreed to sell the plaintiff's 'petroleum products' as 'consigned to him,' and to account for the proceeds when collected; he was to sell at the plaintiff's prices, to bear all expenses except freight and taxes on the products consigned, to furnish his own trucks and other equipment

which must conform with the plaintiff's standards, and at his expense to hire and pay the wages of all necessary assistants, over whom he assumed full control and responsibility and for whose acts he was to indemnify the plaintiff if necessary."

Judge Learned Hand saw no problem in finding this to be normal consignment.

In *Ford Motor Co. v. Benjamin E. Boone, Inc.*, 244 Fed. 335 (9 Cir. 1917), the consignee was required by the agreement to be responsible for the rents, taxes, wages, or other charges or liabilities of any nature arising out of or in connection with his business. The court rejected the contention that the distributor was a vendee and not a consignee (p. 337):

Real estate brokers and stock brokers are also independent businessmen. They pay their own income taxes, license fees, employees' wages, and the like, but they are still agents, and when they charge for property the price set by their principals, there is no price-fixing conspiracy. Insurance brokers, property custodians, all operate the business of an agency in the same way.

Still another respect in which consignment differs in economic consequences from purchase by a dealer is that the consignee is not required to make any investment in inventory. While Simpson's brief repeatedly comments (e.g., pp. 26, 28) that he had to make a substantial investment when he took over the Fresno station, his "investment" consisted of purchase of tools and an inventory of TBA (tires, batteries and accessories) owned by the former lessee.[46] But he did not have to buy any inventory of gasoline:

"Q. But not gasoline.

"A. It didn't include gasoline because it was *on consignment*" (R. 311).

46. He purchased $1800 of these from the prior lessee. Union assisted him in acquiring an additional $1400 of items by purchasing them from the former lessee and selling them to Simpson on a conditional sales contract (R. 310, 311).

Simpson concludes his argument on the subject in pointless statements; for example, that Cal. Civil Code § 2027 allows a factor to sell at the market price after reasonable notice for his reimbursement. What Section 2027[47] provides is that a consignee "must obey the instructions of his principal" but, if he has advanced money to his principal on the security of the consigned goods, he may sell them as a pledge at market price, even though the principal had forbidden him to do so, to reimburse himself. If Simpson had lent money to Union or advanced money for it, he would have been entitled to treat the consigned gasoline as a pledge, and if Union failed to pay him, he could have sold at market, under this Code section. But it is not claimed that Union ever owed Simpson any money or failed to pay him. With equal irrelevance Simpson adds (Br. 64) that a factor may renounce his agency at any time. As we have seen (p. 9, supra), so he could here.

Other arguments by Simpson find their answer in *Ludvigh v. American Woolen Co.*, 231 U.S. 522 (1913), and *Ford Motor Co. v. Benjamin E. Boone, Inc.*, 244 Fed. 335 (9 Cir. 1917). Both dealt with whether agreements were of sale or consignment and held them to be consignments, rejecting as unmeritorious arguments similar to those Simpson makes here.

IN VIEW OF THE McGUIRE ACT, THE ATTEMPT TO DENY THAT THE CONSIGNMENT AGREEMENT WAS A CONSIGNMENT AGREEMENT IS AIMLESS.

Any effort to hold the "Retail Dealer Consignment Agreement" to be violative of the Sherman Act must start by treating it as an agreement of sale by Union and purchase by Simpson containing a resale price clause. Short of that the case does not even begin. But were the agreement so regarded, the resale price clause would not have been illegal, for it would have been a valid *fair trade* agreement.

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47. Quoted in the Appendix hereto.

The McGuire Act[48] (15 U.S.C. §45(a)(2)) provides that nothing in the antitrust acts

> "shall render unlawful any contracts or agreements prescribing minimum or stipulated prices * * * for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute * * * in effect in any state * * * in which such resale is to be made * * *."

California's Fair Trade Act (Cal. Bus. and Prof. Code, § 16,900)[49] is just such a statute. The McGuire Act was Congress' assertion of paramount federal policy after *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). The California Supreme Court, in *Scovill Mfg. Co. v. Skaggs, etc.*, 45 Cal. 2d 881, 291 P.2d 936 (1955), reasserted, in the face of renewed attack on fair trading, that it represented public policy in California.

Union's gasolines handled by Simpson—its "Royal 76" and "7600" brands—are branded products (R. 15, 100) and were in competition with gasolines of other companies (¶ 22, R. 55), such as Standard Oil Company of California, Tidewater Oil Company, Richfield Oil Corporation, General Petroleum Corp., Texas Company, Shell Oil Company, and others (R. 16).

Consequently, the requirement that the dealer charge prices stipulated by Union was legal, *even if* the arrangement were a sale and not consignment, regardless of what it was called. *United States v. Socony Mobil Oil Company*, 150 F. Supp. 202 (D. Mass 1957),

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48. Quoted in the Appendix hereto.
49. Quoted in the Appendix hereto.

certified to this Court, 252 F.2d 420 (1 Cir. 1958), appeal dismissed 356 U.S. 925.[30]

To avoid this fact, Simpson below relied on *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), and pointed to the fact that Union operates 12 retail outlets in California. But what this Court held in the *McKesson-Robbins* case was *not* that a vendor may not fair trade a middleman's price merely because the vendor somewhere sells directly to consumers. What it held was that if the vendor competes with his own customer, he cannot fair trade that customer's prices, because in that situation the resale price agreement ceases to be a vertical arrangement authorized by Fair Trade Acts and becomes a horizontal agreement between competitors. This is the plain rationale of the *McKesson* case, and this is how the courts have understood it. *G.E.M. Sundries Company v. Johnson & Johnson, Inc.*, 283 F.2d 86, 92 (9 Cir. 1960); *G. D. Searle & Co. v. Insl. Drug Distributors*, 151 F. Supp. 715, 722 (S.D. Cal. 1957).

Union never sold gasoline in competition with Simpson. About 2,377 retail outlets sold Union's gasoline in California (R. 332). The 12 operated by Union itself (R. 333) were all for training and experimental purposes, and not one was located in Fresno, California. Eleven were located in Los Angeles and environs,[31] and one

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30. In *G. D. Searle & Co. v. Insl. Drug Distributors*, 151 F. Supp. 715 (S.D. Cal. 1957) (per Yankwich, D.J.), a defendant druggist resisted a trademark suit by a manufacturer on a contention of monopolistic practices and price fixing in that the manufacturer had authorized defendant and other wholesale druggists to make bids to institutions at specified prices on a commission of 10% and had withdrawn defendant's privilege to do so because it bid below the specified prices (pp. 721, 722). The court held that there was no violation of the antitrust laws because the arrangement was one whereby the druggists became the agents of the manufacturer in placing the products in institutions and that, even if the transaction were one of sale and resale, it was exempt as fair trading from the antitrust law (pp. 722, 723).

31. Los Angeles, Beverly Hills, Pasadena, Lakewood, and Anaheim (R. 333).

in San Francisco (R. 353). Courts take judicial notice of the geographic fact that Fresno is about 217 miles from Los Angeles and 183 miles from San Francisco.[52] Whether Union could validly fair trade in Los Angeles or San Francisco is a question not involved in this case.[53] Union was selling at retail in the Fresno area *only* if its method of merchandising was what we say it was, consignment. In that event Simpson was not its competitor but its agent in selling its gasoline; and when it set the price at which its gasoline was to be sold at his station it was not setting his price but its own. Conversely, were it to be said that it sold to Simpson and did not consign, then it was not a retail marketer in Fresno at all and it could validly fair trade in that city; a resale price agreement between Union and Simpson would not have been a horizontal agreement with a competitor.

Simpson's brief (p. 14) also asserts that "Union operates a chain of off brand service stations in the State of California operating under the name of Westways." But the record cited for this assertion (R. 446-49) states something entirely different. It is that Union has an ownership interest in a corporation called Westway which operated its own business. Moreover, the fact that Westway sells "off brand gasoline" would alone make *McKesson & Robbins* inapplicable (*G. D. Searle & Co. v. Inst. Drug Distributors*, 151 F. Supp. 715, 722), as does the fact that Westway's area of operation in California is in the Los Angeles basin.

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52. *Deutch v. United States*, 367 U.S. 456, 470 (1961):
"Indeed, we may take judicial notice of the fact that Ithaca is more than one hundred and sixty-five miles from Albany, and in an entirely different economic and geographic area of New York."

53. Under cases like *Revlon, Inc. v. Janel Sales Corp.*, 1960 Trade Cas. ¶ 69,602 (N.Y. Sup. Ct.) and *Revlon, Inc. v. Wagonfeld*, 1959 Trade Cas. ¶ 69,353 (N.Y. Sup. Ct.), the maintenance of a station for training purposes would not prevent fair trading in San Francisco or Los Angeles.

C. Union's purpose.

To bring the case to a clear posture for its motion for summary judgment, Union acceded to Simpson's request to stipulate that "one of its purposes" was to control the prices at which Union's gasoline was sold to the consumer[54] (R. 414, 429). Simpson now emphasizes this purpose. But we submit, as a matter of common sense, that this is not a relevant fact. Every marketer of goods has a choice of methods. Each method has its advantages and its disadvantages, its burdens and its benefits. By selling directly to the consumer, the vendor may legally determine the retail price. The antitrust law does not say that it is illegal for a vendor to do so; what it illegalizes are contracts, combinations and conspiracies in restraint of trade, and monopolization, attempts and conspiracies to monopolize. As Mr. Justice Holmes frequently admonished, it is not "evasion" to do what the law does not prohibit, *Bullen v. Wisconsin*, 240 U.S. 625, 630 (1916). As said in *Ford Motor Co. v. Benjamin E. Boone, Inc.*, 244 Fed. 335, 340 (9 Cir. 1917), in upholding consignment against antitrust attack,

> "In short, the plaintiff may lawfully do precisely what it professes to be doing under the existing contract, and the question therefore is not whether its object is legitimate, but whether the means it employs are unlawful or are for some other reason ineffective."

D. Epithets about compliance.

Scattered throughout Simpson's brief are words like "policing", "compliance system", and "predatory" (E.g., Br. 5, 23, 25, 39, 66). These are but Simpson's characterizations of the facts described, not a reference to any additional facts. All Union did, after entering into a consignment agreement, was to keep in touch with the

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54. At R. 415, quoted in Appendix C to petitioner's brief, Union's counsel is quoted as referring to sale of gasoline "to the consigned stations". The correct transcription is "through the consignee stations."

consignee through its representative to its dealers to see whether he was abiding by the agreement.[55]

Simpson's citation in this connection (Br. 60) of *United States v. Parke, Davis & Company*, 362 U.S. 29 (1960), has no foundation. That case did not involve consignment but sale to wholesalers, resale to retailers and resale, again, to consumers. A vertical agreement respecting *resale* prices, absent a fair trade statute, is illegal, and a horizontal agreement respecting resale prices is never legal. On the other hand, as *Parke Davis* holds, an announcement by a vendor of its policy not to sell to price-cutters followed by refusal to deal with those who disregard the policy is legal. The question in the *Parke Davis* case was whether there was this unilateral conduct or agreement. To that end the Court examined a variety of activities and concluded that there were both vertical resale price agreements and horizontal agreements.[56]

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55. Additionally, Simpson's brief contains a number of inexcusable innuendoes. It states (at p. 25) that "in 1956 there were 765 cancellations of leases (R. 156). 559 were mutual cancellations for other than financial difficulties (R. 156 . . .)". The innuendo is that these were connected with noncompliance with consignment or refusal to become consignee. Nothing could be falser. The record reference is to answers given in 1957 to a subcommittee of the House of Representatives, in the record by a request for admissions (R. 111, et seq.). The record is plain that all these were *mutual* cancellations. 206 caused by the dealer's financial difficulties, and the others "in the order of their frequency of occurrence were: Other business preferences; leased another station, either with Union or competitive; ill health; termination of Union's lease from station owner; death or moved from area; domestic difficulties; partnership dissolution" (R. 156). In 1957 there were 3 instances where expired leases were not renewed, in 1956, ten (R. 156).

56. There were two sets of facts in the *Parke Davis* case that established conspiracy. Parke Davis informed each of its customers that it was speaking to others and had obtained agreement of each to adhere if the others did; *this* was the conspiracy and combination:

> "Parke Davis did not content itself with announcing its policy * * * and following this with a simple refusal to have business relations with any retailers who disregarded that policy. Instead Parke Davis used the refusal to deal with the wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices * * *. In thus involving the wholesalers to stop the flow of Parke

In the present case an agreement between Union and its dealer respecting retail price need not be labored or deduced; it is in the written document. The question is not whether there was an agreement but whether the legality of the agreement can be denied since it is one of consignment or protected by the McGuire Act. As to that, *Parke Davis* says nothing. And in the present case there was no horizontal conspiracy. It cannot be inferred from the mere fact that Union had a considerable number of consignment agreements, and Simpson has disavowed claiming any other basis for an argument that a horizontal conspiracy existed (see p. 35, supra).

E. The claim of monopolization.

In the Statement of the Case (at p. 17, supra), we pointed out that there were approximately 36,000 service stations on the West Coast of which 21,000 were either owned by dealers themselves or leased by them from third persons other than any of the seven largest oil companies. The total number of retail outlets selling Union gasoline was about 3600 on the West Coast of which 2377 were service stations in California. But in only 1335 in California did Union have any property interest by fee or lease. About 21,000 other stations in California sold products supplied by more than 16

Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices. Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act." (p. 45)

The second set of facts was this (R. 46-47):

"Moreover, * * * it discussed the subject with Dart Drug. When Dart indicated willingness to go along the other retailers were approached and Dart's apparent willingness to cooperate was used as the lever to gain their acquiescence in the program. Having secured those acquiescences Parke Davis returned to Dart Drug with the report of that accomplishment. Not until all this was done was the advertising suspended and sales to all the retailers resumed. In this manner Parke Davis sought assurances of compliance and got them, as well as the compliance itself. It was only by actively bringing about substantial unanimity among the competitors that Parke Davis was able to gain adherence to its policy."

refiners. Union gasoline was only about 11.5% of the total gasoline sold through service stations of any and all kinds in California. There were at least 246 service stations in Fresno, California of which only 26 were selling Union gasoline.

Courts judicially know that this competitive situation prevails throughout California where there is a "rather extensive list of great corporations engaged in the manufacture and sale of petroleum products." *Paraco, Inc. v. Dept. of Agriculture*, 118 C.A.2d 348, 353, 257 P.2d 981, 984 (1953), and this Court has noted that even Standard Oil Company of California, selling 23% of the gasoline in the Western area and with its company-owned service stations selling 6.8% of the total, did not have a dominant position. *Standard Oil Co. v. United States*, 337 U.S. 293, 295, 302 (1949).

Under these facts the claim is not—it could not be—that Union monopolized or attempted to monopolize the gasoline business. That would be frivolous, and it was disavowed by Simpson in the District Court (see p. 16 supra).[57] It is not—nor could it be—that Union monopolized or attempted to monopolize service station sites; that would be even more ridiculous. There were over 23,000 service stations in California, and Union owned or held leases on only 1335. Moreover, the possible number of service stations is infinite, for there is endless realty in California and anyone can erect a station who wishes.

Consequently, the claim must be that Union "monopolized" or "attempted" to monopolize its own brand of gasoline. But it is

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57. At Br. 74 Simpson speaks of Union as having "the ability to control prices." If Simpson means by this a power to control the price of gasoline in California in the face of all the competition described above, he indulges in palpable nonsense. His own descriptions of the record elsewhere in the brief (e.g., Br. 22) show that Union's effort in the early part of the period in question was to try to get a few cents more than major competition, if possible (R. 231-32). But it gave up the effort and adopted the policy of following major competitors' prices downward (R. 75, 256, 282), and, if Standard's prices were lower than others, to go as low as Standard (R. 75, 283).

elementary that the power which manufacturers have over their own trademarked products is not the power that makes an illegal monopoly." *United States v. E. I. Du Pont De Nemours & Co.*, 351 U.S. 377, 393 (1956); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir. 1957), cer. den. 355 U.S. 822 (1957); *Nelligan v. Ford Motor Co.*, 262 F.2d 556, 557 (4 Cir. 1959);[58] *A-1 Business Machine Company v. Underwood Corp.*, 216 F.Supp. 36 (E.D. Pa. 1963).[59]

Simpson comments that gallonage sold by Union was large (Br. 14). This is irrelevant to "monopolization". E.g., *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 1963 Trade Cases ¶ 70,886, at p. 75,564 (9 Cir., Sep. 1963). Standard Oil Company of California sells much more gasoline directly to the consumer than does Union. Yet Simpson concedes that Standard does not thereby violate any antitrust law. No law required Union to sell its gallonage to a middleman for resale or precluded it from selling directly

58. Thus in the *Nelligan* case the court commented,

> "* * * Plaintiffs do not allege that Ford monopolized or attempted to monopolize the market for automobiles, parts or accessories generally, but only the market represented by its own franchise dealers * * *."

and that, it held, was not a violation of the law.

It is preposterous for Simpson to invoke (Br. 74) the case of the aluminum monopoly (*United States v. Aluminum Company of America*, 148 F. 2d 416) and the Circuit Court opinion in *American Tobacco Co. v. United States*, 147 F.2d 93 (Br. 72); when this Court took and decided that case, it emphasized that its essence was that the *Big Three Tobacco* companies had horizontally conspired to monopolize (328 U.S. 781, at 784-86, 798, 800).

59. In the *A-1* case this is said:

> "It has long been recognized that a manufacturer has a right to a monopoly in the sale and distribution of its own product. Federal Trade Commission v. Sinclair Refining Co., 261 U.S. 463, 43 S.Ct. 450, 67 L.Ed. 746 (1923). This may be and often is accomplished through exclusive dealers or agents. A large part of our economic growth has been due at least in part to this method of doing business. Unless the right to seek and maintain such a monopoly continues a large part of the efficiency of our distributive system may be lost." (p. 37).

to the consumer. *Ford Motor Co. v. Benjamin E. Boone, Inc.*, 244 Fed. 335 at 340 (9 Cir. 1917) (quoted at p. 46, supra). As said in *Schwing Motor Company v. Hudson Sales Corporation*, 138 F. Supp. 899 (D. Md.), affirmed on the opinion of the District Court in 239 F.2d 176 (4 Cir. 1956), cer. den. 355 U.S. 823 (1957), a Sherman Act case involving a refusal to renew a dealer's one year contract:

> "Every manufacturer has a natural and complete monopoly of his particular product, especially when sold under his own private brand or trade name. [Citation]. If he is engaged in a private business, he is free to exploit this monopoly by selling his product directly to the ultimate consumer or through one or more distributors or dealers, as he may deem most profitable to him. If he chooses the latter method, he may exercise his own independent discretion as to the parties with whom he will deal. This is a common law right which the anti-trust laws have not destroyed. [Citations] * * *" (p. 902).

In *Alexander v. Texas Company*, 149 F. Supp. 37 (W.D. La. 1957), the court described an identical claim of attempted monopolization in a case of termination of a service station lease as "sheer nonsense" (p. 44).[60]

The pointlessness of the claim of monopolization is shown by the following colloquy (R. 440, 441):

> "The Court: There is no argument about the proposition that if Union had operated this station or all of these stations directly through its own employees; they could fix any price they wanted to?
>
> "Mr. Keith: No question about that.
>
> * * *
>
> "If you say you are putting $100,000,000 into the station[s] and it is a tremendous investment, then you can make these

60. This is particularly applicable to Simpson, for his station did no more than 1/5 of 1% of the gasoline business in Fresno (R. 17), and the amended complaint alleged (¶ 22, R. 55) that three service stations selling the products of Standard, Tidewater and Richfield were "directly competitive" to the service station leased by him.

people your employees and you can control prices. It is your product and you can do anything you want with it * * *."

While counsel then sought to distinguish this case, there is no escaping his recognition that, if Union had operated the same number of stations through wage-paid employees, selling the same gallonage, there would be no violation of the antitrust laws. That should be a complete answer to the claim of monopolization, for there is no more monopolization where Union leases out its stations and engages the lessees as its agents than where it operates the stations by its own employees. If consignment makes a difference, the difference must be in consignment, unaided by rhetoric about monopolization. Else words have no meaning.

F. The claim of exclusive dealing.

This is a sham claim for three reasons.

1. SIMPSON FOUNDS NO CLAIM OF DAMAGE ON EXCLUSIVE DEALING.

In a private suit for damages the plaintiff cannot roam at will in charges of violation of antitrust laws but must confine himself to such as have caused damages of which he complains. *Dehydrating Process Co. v. A. O. Smith Corp.*, 292 F.2d 653, 657 (1 Cir. 1961), cer. den. 368 U.S. 931, and cases cited at p. 80 infra.

As we have seen (pp. 9-11, supra), Simpson claims *but two* types of damages: (1) from "inability" to charge for gasoline what he wished, and (2) from Union's refusal to give him a new lease, and the sole reason claimed by Simpson for that refusal was that he sold consigned gasoline at prices other than specified by the consignor; as put in his brief (p. 24), "The respondent refused to renew petitioner's one year lease because he did not abide by price orders." No damage from "exclusive dealing" has been asserted.

2. UNION COULD LEGALLY HAVE REQUIRED ITS AGENT TO HANDLE ITS GASOLINE ALONE.

It is legal under the antitrust law for one to require a consignee —an agent—to handle no one else's product. *Federal Trade Commission v. Curtis Pub. Co.*, 260 U.S. 568 (1923). Union could lawfully have required its consignees to handle its gasoline alone. It also leased to Simpson the gasoline pumps and the underground storage tanks (R. 28). It could lawfully have limited Simpson's use of this leased equipment to its gasoline. *Federal Trade Comm. v. Sinclair Co.*, 261 U.S. 463 (1923). Thus the Consent Decree in the West Coast Oil case, *United States v. Standard Oil Company of California*, 1959 Trade Cas. ¶ 69,399 (S.D. Cal.), provided in para. XIV(2)(ii) (p. 75,533):

> "[A]ny consenting defendant may require that any pump or tank * * * for refined petroleum products * * * furnished by it and marked as such to a dealer shall be used solely for the storing, handling or dispensing of such products supplied by such defendant * * *."

3. THE SOLE FACT TO WHICH SIMPSON CONFINED THE CLAIM IS NO EVIDENCE AT ALL OF ANY "EXCLUSIVE DEALING" AGREEMENT.

While it legally could have, Union neither required its consignee to handle its gasoline nor limited use of its leased equipment. As already noted (p. 20 supra), neither lease, consignment agreement, nor any other writing required Simpson or any other dealer to deal solely with Union. In addition, in support of its motion, Union filed an affidavit of its General Sales Manager that

> "No lease or contract between Union and plaintiff required him to buy any products of the Union Oil Company of California or not to handle or sell products made by anyone else." (R. 38)

In response, it was incumbent on Simpson under F.R.C.P. Rule 56(e) to adduce some evidence if he wished to raise an issue of fact. See pp. 36, 37, supra; also *Gold Fuel Service, Inc. v. Esso*

Standard Oil Co., 306 F.2d 61 (3 Cir. 1962), cer. den. 371 U.S. 951.[61] Instead, as we have seen (pp. 20, 21 supra), Simpson rested his claim on one fact alone, viz., that Union has only one "split-pump" dealer. As the District Court below correctly reacted (R. 434), that lone fact is simply no evidence that Union required its dealers to refrain from handling the gasoline of others. It could not carry the issue to a jury, for it would not support a verdict that Union entered into an agreement with its dealers that they would handle no other gasoline.

In the Statement of the Case we cited (at p. 23) the California statutes, designed to protect the public from fraudulent substitution, which require gasoline pumps and tanks to be labelled with a brand or trademark and prohibit dispensing any other brand of gasoline from or through the equipment. If Simpson or any Union dealer had wished to handle another brand of gasoline than Union's, State law would thus have required him to repaint and relabel the station and remove Union's insignia and colors or to have separate tanks and pumps separately painted and not even located under the same canopy. No claim has ever been made that Simpson wished to do this or that he could have recovered the extra investment had he done so.[62]

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61. As said in the *Gold Fuel* case, where summary judgment in an anti-trust case was affirmed:

> "This omission is fatal to the plaintiff's case even before trial, at least where uncontradicted affidavits and other documentary material submitted on motion for summary judgment, if true, provide a conclusive negation of the generally pleaded conspiracy claim, and plaintiff has failed to take advantage of ample opportunity by discovery or otherwise to contradict defendant's showing."

62. Colloquy at R. 434:

> "The Court: * * * You would have to have two separate tanks, wouldn't you, underground?
>
> "Mr. Keith: Well, yes, you would have to have—
>
> "The Court: You would have to have two different deliveries?
>
> "Mr. Keith: Well, you have this kind of a situation.
>
> "The Court: Double pickups."

Impartial observers recognize that split-pump stations are unacceptable to the public and to informed service station operators. The U. S. Department of Commerce in its "Establishing and Operating a Service Station", published in 1945 for the guidance of veterans returning to civilian life, stated (pp. 97, 98):

> "It is the opinion of most people in the trade that one-brand stations are most successful, on the average, than are stations that sell more than one brand. According to the statements of many operators in the business, stations that sell two or more brands of gasoline often fail to realize their greatest potential volume of business because approaching motorists find it difficult to associate the station with any one brand."

Simon N. Whitney, Chief Economist and Director of the Bureau of Economics of the Federal Trade Commission, points out that the one brand station method of merchandising is virtually demanded by the motoring public. In I Whitney, Antitrust Policies, (The Twentieth Century Fund, New York, 1958), he states, pp. 129-30:

> "Although the *Standard Stations* and *Richfield* cases dealt primarily with exclusive dealing in gasoline, there is in fact little future in the attempt to have stations handle more than one brand. 'Split pump stations,' as they were called, were formerly quite common, but defects of the system caused most of them to disappear. As early as 1931 two surveys showed 85 and 95 per cent of motorists expressing themselves as opposed to it, primarily out of fear that the dealer would substitute the second brand for the desired one. Not only did dealers find that handling one brand required less investment and less bookkeeping, but six out of seven felt that it actually increased sales."[63]

63: In 1931, *United States v. Standard Oil Company of New Jersey*, 47 F.2d 288, 300-01 (E.D. Mo.), commented on the development of the method of merchandising gasoline through filling stations handling a single brand:

> "Another influence is that the companies have almost universally adopted trade-names for their products—particularly those for auto-

Simpson's brief boldly asserts (p. 26) that "The record * * * showed that the effect of the retail dealer consignment agreement program was to effectuate exclusive selling of gasoline at thousands of outlets." He gives no references to the record for this assertion, nor can he, for it is unfounded. It will be recalled that Union has 1030 dealers in California who are not its lessees but either own their stations or lease them from third parties, and that Union sold rather than consigned to 234 of these (R. 334). Yet none of these were "split pump" dealers; that fact could not be attributed to Union's leases and consignment agreements.

G. The claim of coercion.

We have seen (pp. 18, 19) that what Simpson calls "coercion" is simply the position taken by A that, if B wishes to contract with A or to acquire a leasehold in A's property, A will deal with him only on terms satisfactory to A. This kind of argument was denominated "absurd" in *Danebo Lumber Co. v. Koutsky-Brennan-Vana Co.*, 182 F.2d 489, 493 (9 Cir. 1950), cer. den. 340 U.S. 830.

A refusal by one party to enter into a business relationship with another except on certain contract terms is not coercion. *Gummed Tape Co. v. Miller*, 155 F. Supp. 267, 271 (E.D. Pa. 1957). One who *chooses* to go along for business reasons cannot claim duress. *Philco Corp. v. Radio Corp. of America*, 186 F. Supp. 155, 162 (E.D. Pa. 1960). Since, as said in *Agneu v. Parks*, 172 C.A.2d 756, 764, 343 P.2d 118, 123 (1959), "it is not actionable coercion or duress to threaten to do what one has a legal right to

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mobile use. Extensive, nation-wide advertising has taken place, with the design and result of creating a demand in the individual automobilist for a particular brand of gasoline or oil or both. * * *

* * *

"We have not attempted to state the many influences which have shaped nor to trace—except in veriest outline—the course of development of the industry. * * * *It is not of their making, and is beyond their control. It is a business current which they cannot successfully oppose. It cannot be ignored in judging their actions and the results therefrom.*"

do", *a fortiori* it is not coercion to refuse to enter into a contract.

Stripped of verbiage, Simpson's grievance is that he wanted to do business with Union but it refused to do business with him on *his* terms. He wished to occupy *its* real property and sell *its* gasoline but on *his* own terms. Union was not selling gasoline to lessees for resale. The only basis on which it cared to merchandise gasoline on premises owned by it was to sell its gasoline directly to the consumer by the agency of consignees. It so informed him, and he accepted the terms. This is not coercion.

Simpson talks about being deprived of "freedom of choice" (e.g., Br. 43). But "freedom of choice" means the right to choose between alternatives when one can take either but not both. It does not mean the right to have the best of both. A contract is a consensual matter. Simpson had a freedom to choose whether to become a Union dealer on terms agreeable to Union or, if those terms were not satisfactory to him, of not becoming a Union dealer. Freedom of choice to Simpson does not mean denial of choice to Union. Freedom to contract must be the freedom of both parties to contract on terms mutually acceptable. The antitrust laws have not made a gasoline refiner a public utility which must sell its gasoline and lease out its real property on terms thought by the dealer or by juries to be reasonable.

Marshall v. Packard-Bell Co., 106 C.A. 2d 770, 236 P.2d 201 (1951), affirmed a judgment on a demurrer to a complaint by one of defendant's distributors to recover contributions to an advertising fund; the court said (p. 774):

> "it is disclosed that the only fact alleged constituting duress was that defendant corporation threatened to deprive plaintiff of his exclusive distributorship in the event he did not make the contribution. . . . [I]t does not constitute duress or coercion to threaten to do that which a party has a legal right to do. [citations]
>
> "* * * defendant corporation had the right to terminate its distributorship contract with plaintiff at any time. Therefore

when it threatened to do so unless plaintiff made a contribution to the advertising fund, such threat did not constitute illegal duress or coercion, as defendant corporation was merely threatening to do something that it was legally entitled to do. *Hence plaintiff's contribution was made by him voluntarily.*"

In *Nelligan v. Ford Motor Co.*, 262 F.2d 556 (4 Cir., 1959), a judgment of dismissal was entered against a Ford dealer who sued Ford for $150,000 damages, claiming a violation of the antitrust laws in that Ford terminated the Sales Agreement in accordance with its terms because of plaintiffs' protest against and unwillingness to continue payments to an advertising fund. The plaintiffs' contentions were these (p. 556):

> "The complaint alleges that Ford's right to terminate a dealership at will on sixty days notice, together with other provisions contained in the agreements, permitted Ford to control and dominate the business of its dealers in violation of sec. 1 of the Sherman Act, and to coerce plaintiffs and other dealers into courses and methods of conducting business which they as independent businessmen would not otherwise have pursued. * * * [p. 557]
>
> * * *
>
> "Finally, plaintiffs argue that the cancellation of plaintiffs' sales agreements was the result of a coercive and unlawful conspiracy resulting from plaintiffs' protests against and unwillingness to continue to make the contributions to LMDA * * *." [p. 559]

Not only Simpson's contentions but his very words seem borrowed from those of Nelligan!

What Simpson's contention comes to is that the conjunction of a one-year lease and a consignment agreement has antitrust significance. To that subject we now turn. But if that conjunction does have antitrust significance, it must find its support in some other kind of reasoning than recourse to terms like "coercion", which is a desecration of straight thinking.

H. No illegality attaches to the conjunction of Lease and Consignment.

Neither legal reasoning nor economic reality can find illegality in the conjunction of lease and consignment. In the *West Coast Oil* case, *United States v. Standard Oil Co.*, 1959 Trade Cas. ¶ 69,399 (S.D. Cal. 1959), the Consent Decree requires each defendant to offer to its dealers both a supply agreement and a lease of premises occupied (Sec. XII(B)), and provides (Section XII(D), p. 75,532):

> "Each such agreement and each such lease may provide in substance or effect * * * (ii) that deliveries thereunder may be suspended and/or that it may be terminated by the defendant party thereto at any time prior to the expiration of its stated term, * * * *for the breach of any provision thereof* * * *. Where a dealer holds such an agreement and such a lease covering the same location each or either of them may provide in substance or effect that a breach of one shall constitute a breach of the other and/or that the cancellation or termination of one shall be effective to cancel or terminate the other.*"

And it will be recalled (pp. 43-44, supra) that a consignment agreement, such as Union's, is a "supply agreement" within the meaning of this decree. Section XII(D) is of interest as reflecting the views of the Department of Justice of what does not offend the Sherman Act.

Simpson's brief contains much on the law of "tying agreements". But nothing Union did involved a "tying agreement" either under Section 3 of the Clayton Act or Section 1 of the Sherman Act.[64] Nowhere did Union condition the sale or lease of any commodity, realty, or service on the purchase or lease of any other.

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64. Section 3 of the Clayton Act is not one of the statutes invoked by the complaint (R. 4, 46) or by the petitioner's brief (Br. 2). The tying arrangements proscribed by Section 3 relate solely to commodities, so that Section 3 could have no bearing on a lease of realty.

The fact—stipulated by Union for the purpose of its motion—that it would lease its realty only to one who would execute a consignment agreement—was not a tie-in within the meaning of any of the cases. By signing a consignment agreement a lessee did *not* agree to take *any* quantity of gasoline *at all* from Union, nor did he preclude himself from buying or handling the gasoline of anyone else. This we have seen (pp. 13, 20-22, supra). The consignment agreement merely specified the terms on which any gasoline the lessee saw fit to take from Union would be handled. In short, concurrently with leasing a station Union was informing the lessee that it would not be selling gasoline to him and that, if he should obtain gasoline from it, he would be doing so as an agent. After signing the agreement, he was still free to get his gasoline elsewhere.

Simpson's other point of attack is the supposition—also stipulated to as a fact for purposes of Union's motion—that Union would not give a *new* lease to one who had violated a consignment agreement, i.e., to one who, after obtaining gasoline from Union to handle as its agent, violated his instructions. This still is no "tie-in". It would seem to be a matter of common sense for a person not to enter into new contract relationships with another who has breached old contracts with him.

Simpson's discussion is difficult for us to follow, but it appears to contain an innuendo that Union would not renew the lease of one who had not obtained his gasoline from Union (e.g., Br. 43, 69). No such charge was made in the Amended Complaint (R. 46-59) or in Simpson's "Pretrial Statement for Pretrial Ruling" (R. 199-212), nor was any such fact stipulated to by Union. But were it to be assumed that this was the fact, there still would be nothing illegal. Before Section 1 comes into operation, there must be an *agreement*.[65] And a refusal of Union to give a new lease to one because

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[65] At this juncture we set to one side "combinations" and "conspiracies", for they are not here involved. As Simpson's counsel made his position clear (R. 395), "The central issue here is contracts in restraint of trade * * *"

during his expired term he had obtained gasoline elsewhere would not be an agreement at all. It has repeatedly been recognized and held that discontinuance of relations with another because he will not deal with the first party exclusively is not a tying agreement. It is the *absence* of any agreement. The grievance of the party cut off is not the existence of an exclusive dealing agreement but the absence of any agreement with him. But this is not illegal and no ground for recovery. *Leo J. Meyberg Co. v. Eureka Williams Corp.*, 215 F.2d 100 (9 Cir. 1954), cer. den. 348 U.S. 875 (1954); *Nelson Radio and Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5 Cir. 1952), cer. den. 345 U.S. 925; *Hudson Sales Co. v. Waldrip*, 211 F.2d 268 (5 Cir. 1954), cer. den. 348 U.S. 821; *Allied Equipment Co. v. Weber Engineered Products, Inc.*, 237 F.2d 879 (4 Cir. 1956); *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4 Cir. 1959). The governing principle we discuss more fully in Part II below at pp. 90-97, where we show that the conduct is recognized as legal by *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

Not only is there, in such a situation, no agreement to which Section 1 can attach, but for Union to follow a practice of not giving new leases to dealers who had not handled a satisfactory volume of its gasoline would be neither a restraint of trade nor unreasonable. Union is not in the real estate business. It obtains the fee or possessory interests in service station sites in order to develop an outlet for its gasoline in fierce competition with numerous other refiners.[66] As said in Barber, "Refusals to Deal Under

66. Mr. Reese Taylor, Chairman of Union's Board (R. 441) testified that "any consignee or lessee of the Union Oil Company who did not meet our requirements as to operation of the station, presumably his lease would not be extended" but that if "in every way he was a satisfactory dealer, certainly I think his lease would be extended." (R. 450-2). We submit that a more reasonable position cannot be imagined.

It may be noted, in passing, that Simpson's brief incorrectly summarizes this testimony as being that it was Union's "policy * * * to renew its one year lease on a continual basis with all those who do follow Union's policies" (Br. 26, 68).

Antitrust Laws", 103 U. of Penn. Law Rev. 847 at 859 (1955):

> "* * * common sense compels the conclusion that a producer should remain free to discontinue business relations with individual distributors or dealers who are not doing an effective job of selling, whether this ineffectiveness results from business ineptitude or from the fact that the dealer has diluted his efforts by handling competing lines, or the fact that his activities derogate from the public good will attaching to the producer or his product. It is the essence of competition that the manufacturer or wholesaler should and does have wide freedom in maintaining the quality of his distribution system."

If Union monopolized the gasoline business or service station sites, or if its refusal to give a new lease to one whose term had expired excluded him from business, it might be that another kind of problem would be involved. But, as we have seen, none of these things were so. Union had a property interest in only 1335 service stations in California. Nearly that number (1030) of Union dealers in California (see p. 5, supra) owned their own stations or leased them from lessors other than Union. And there were 20,000 other stations obtainable from innumerable other lessors and refiners. Within 30 days after leaving the Union station, Simpson had a General Petroleum station in Fresno (see p. 12, supra).[67]

If a rule were to be declared that a refiner who has stations to lease must continue to lease to one handling a competitor's gasoline, one of two consequences must follow. Either the refiner will have to cease leasing to anyone and operate all its stations through its own employees, or it will have to cease possessing sta-

67. In *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 6-7 (1958), this Court said:

> "As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

tions entirely. But if this economic consequence is socially desirable, it is for Congress to declare it, and Congress has not done so. It cannot be spelled out of the Sherman Act.

The Richfield case.

Simpson discusses *United States v. Richfield Oil*, 99 F.Supp. 280 (S.D. Cal. 1951), at length (Br. 58, et seq.) and repeatedly cites and relies on it as supporting his contention that the conjunction of a one-year lease and consignment was illegal. *Richfield* does not support him. The court explicitly pointed out that the dealers there were *not* consignees (see p. 46 supra). They were purchasers, and the essence of the case was an admitted oral agreement between Richfield and the dealers to handle its products exclusively.[68] The court did *not* require even as much as one-year leases. It simply held that leases, although purporting to be terminable on 24 hours' notice, could not be so terminated because they provided for 30-day rental (p. 287, 1st col.) and therefore under state law they were actually 30-day leases (pp. 286; 290, 2d col.; 297). In consequence they could be terminated only on a 30-day notice.[69] Union's one-year lease gave its lessees not less, but 12 times as much tenure as the *Richfield* decision gave Richfield's lessees.

I. The case as a whole.

In the foregoing pages we have examined every aspect of Union's conduct to see whether it violated the antitrust laws. It

68. "The problem is simplified as to the L-O stations by the Richfield admission that the oral understandings under which the leases are made, and for the violation of which the leases are forfeited under the 24-hours' termination clause, to be referred to, not only provide but demand that Richfield petroleum products and Richfield-sponsored TBA products be handled exclusively and without deviation." (99 F. Supp. at 286)

69. "The 24-hours' termination clause is invalid, against public policy, and cannot, either under state or federal law, be enforced as a means of terminating the lease for even legal grounds by any notice by either side less than at least the minimum rental period for which rent is reserved, one month." (99 F. Supp. at 297)

has been said that the various factual components of a case should not be compartmentalized. While this has been said only in respect of ascertaining whether a conspiracy existed,[70] and this case involves no conspiracy, we now submit that, everything added together, there still was no violation of law. Here is not a series of bricks making up a wall. Here is a sum of zeroes, which is still zero.

The case is this: Union appointed agents to sell its gasoline at its prices, leased its realty to its agents, and, when one agent's lease expired, refused to give him a new lease because he had been a faithless agent. The Sherman Act has nothing to do with this set of facts.

III.

SIMPSON HAS SUFFERED NO ACTIONABLE DAMAGE

We have submitted that Union did not violate the Sherman Act. The Court of Appeals did not decide that question, because it concluded that it was unnecessary to reach it, for even if Union had done so, "it appears clearly on the record that Simpson suffered no actionable damage" (R. 565). In this conclusion we submit that the court was correct. As it stated (R. 569-70):

> "It is clear that the private litigant in a suit charging violation of the antitrust laws stands in a different position than the government in an antitrust action. In a government action, there need be present only a violation of the laws and damage to individuals need not be shown. The private litigant must not only show the violation of the antitrust laws, but show also the impact of the violations upon him and damage to him resulting from the violations of the antitrust laws."

This is elementary, expressly stated in Section 4 of the Clayton Act. *Wolfe v. National Lead Co.*, 225 F.2d 427 (9 Cir. 1955), cer.den.

70. *Continental Ore Corp. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

350 U.S. 915; *Dehydrating Process Co. v. A. O. Smith Corp.*, 292 F.2d 653 (1 Cir. 1961), cer. den. 368 U.S. 931.

Simpson argues that no requisites to a plaintiff's right to sue under Section 4 of the Clayton Act may be imposed "beyond what was specifically set forth by the Congress" (Br. 53). This is true, but irrelevant, for one of the two basic requisites Congress *did* impose is that the plaintiff "has thereby suffered injury" as the result of the violation. *Radovich v. National Football League*, 352 U.S. 445, 453 (1957). A violation of the antitrust law is not a treasure trove into which any passerby may dip for a reward. The particular violation must be the cause of the supposed damage before there may be recovery.

We test the two claims of damage (pp. 9, 10, supra) against this principle.

A. Simpson may not recover damages for alleged inability to charge what he wished for gasoline while he was a consignee: the claim for $1000.

Simpson's first claim of damages is that while he was a Union consignee he lost $1,000 from *inability* to charge as much as he wished for gasoline (p. 10, supra). The predicate of the claim is that the Consignment Agreement was unlawful (see p. 12, supra). But assuming that it was, one of two conclusions must follow.

1. THE PRICES AT WHICH SIMPSON SOLD WERE HIS VOLUNTARY ACT.

If the consignment agreement were unlawful, the Attorney General could have sued to enjoin it or could have, within the period of limitations, prosecuted Union criminally,[71] or Simpson could have rescinded the agreement, or simply refused to adhere to it; if Union had sued to enforce the agreement, illegality would have been a complete defense. *Bement v. National Harrow Co.*, 186 U.S. 70 (1902); *Continental Wall Paper Co. v. Louis Voight &*

71. Simpson's remark (Br. 42) that "private agreement does not erase the violation" is thus pointless.

Sons Co., 212 U.S. 227 (1909). If Simpson in fact charged less or more for gasoline than he now says he preferred to do, *his conduct was his own*, and any damages flowing therefrom flowed from his voluntary act, for which he cannot recover damages. *Alexander v. Texas Company*, 165 F. Supp. 53, 61 (2d Col.) (W.D. La. 1958).

Simpson in fact exercised the power to charge whatever he wished. The amended complaint alleges (¶ 23, R. 55-56) that,

> "On or about March 1958 * * * plaintiff, after requesting authorization from defendant which was refused, lowered his price to 27.9¢. The stipulated consignment price, however, had been set at 29.9¢ by defendant",

and the Amended Complaint limited the period of Simpson's alleged inability to set prices to the time *prior* "to March 1958". His brief in this Court avows that he "thereafter continued to establish market prices of his own judgment" (Br. 34). Yet it is self-evident that since Simpson was able, from March to June 1958, to charge prices other than those authorized under the agreement, *he was able to do so at any other time*. And this he repeatedly did, as he testified (R. 313):

> "Q. * * * And when you were putting those prices on the pumps, were the prices that you were putting on higher or lower than the prices authorized?
>
> "A. Both cases.
>
> "Q. And were you arriving at those prices that you were putting on the pumps through the exercise of your own business judgment?
>
> "A. Yes."

As the Court of Appeals said (R. 572), Simpson's "action in March 1958 demonstrates that he was not unable to fix prices on gasoline * * *. [W]hen his claim is based on an alleged *inability* [italics in original] to change the situation and his own action shows the ability we think his claim fails." To the same legal effect, *Shasta*

Douglas Oil Co. v. Work, 212 A.C.A. 640, 28 Cal. Rep. 190 (1963).

What Simpson's legal position amounts to is this: where A agrees with B to perform a certain line of conduct and from time to time does so, he can then recover treble damages from B on the theory that B could not have compelled him to perform the contract for illegality under the Sherman Act! *No case has ever so held*, and the contention is contrary to common sense, common fairness, and elementary law. A party, tendered an illegal contract, should decline to enter into it, or, having entered it, he may seek an adjudication that it is not binding on him. Alternatively he may simply ignore it and, if sued, set up illegality as a defense. *He cannot, however, observe the contract and then recover treble damages for having done so. Ring v. Authors' League of America*, 186 F.2d 637 (2 Cir. 1951), cer. den. 341 U.S. 935.

The doctrine, *volenti non fit injuria*, is elementary in the law. As expressed in Cal. Civ. Code § 3515, "He who consents to an act is not wronged by it." Here, the applicable principle is even stronger: He who *does* the act is not wronged by it. He may not charge another for what he himself has done.

In *Pinney & Topliff v. Chrysler Corp.*, 176 F. Supp. 801 (S.D. Cal. 1959), plaintiff sued in two counts, one under state law and the other under the federal Automobile Dealers Act, for damages for termination of a dealership. Judge Yankwich held for defendant. He said (p. 810):

> "To conclude: Pinney is seeking to recover, in tort, for a voluntary act on their own part which ultimately resulted in the liquidation of their automobile agency. The Civil Code of California [C.C. 3515] declares: 'He who consents to an act is not wronged by it.' This is a codification of the maxim *volenti non fit injuria, which is a basic tenet of our jurisprudence*. It precludes the maintenance of an action for a wrong by one who has "consented to the act' which has occasioned his loss' ". Its application to the facts in this case would, of itself, call for denial of recovery."

In an attempt to answer the obvious conclusion, Simpson argues that the doctrine of *pari delicto* is inapplicable (Br. 46, et seq.), and he cites cases that relate to that doctrine or to the doctrine of "unclean hands". But the doctrine of which we speak is neither of these.[72] The "unclean hands" doctrine is one of fastidiousness and denies access to court to one whose hands are themselves unclean, either because of participation in the same wrong as defendant or in another and related wrong abhorrent to the court, and it has been applied in the antitrust field. *Singer v. A. Hollander & Son*, 202 F.2d 55, 59, 60 (3 Cir. 1953) (per Goodrich, J.). The doctrine of "*pari delicto*" is a refusal to entertain the grievance of one participant against another in a wrongful scheme, even though the claim is for damage inflicted *by* the one *on* the other. It may be that either doctrine may give way to superior considerations of public policy, so that the one may be permitted to recover for damage *caused by the other*. But the instant case turns on the fact that the alleged damage to Simpson was not caused by Union. What Simpson charged for gasoline he did himself.

Consequently the cases cited by Simpson (Br. 46-48) are not in point. A plaintiff will not be denied recovery because of the unclean hands of having been or being engaged *in some other or collateral* illegal conduct, e.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951), and *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954).[73] Or, *after* one withdraws from a conspiracy, he will not be barred from recovering treble damages *thereafter* inflicted on him by the other conspirators by the con-

72. At Br. 10 Simpson states that Union's answer to the complaint pleaded *pari delicto*. Our answer does not use that term (R. 94).

73. In the *Mead* case plaintiff was damaged by defendant's illegal price-cutting and was not to be denied relief because plaintiff theretofore had participated in an illegal boycott against defendant. In *Kiefer-Stewart* plaintiff was damaged by being denied a supply of goods by a conspiratorial boycott of vendors and was not denied relief because plaintiff had theretofore itself been in a price fixing conspiracy.

tinuance of the conspiracy. e.g., *Connecticut Importing Co. v. Frankfort Distilleries*, 101 F.2d 79, 81 (2 Cir. 1939).

But what one himself does merely because he saw fit to do so pursuant to an agreement he now says is illegal he cannot charge to the other. *Pennsylvania Water & P. Co. v. Consolidated G. E. L. & P. Co.*, 209 F.2d 131 (4 Cir. 1953), cer. den. 347 U.S. 960 (1954). In the case just cited a contract between plaintiff and defendant provided that plaintiff could not make an extension to its plant without defendant's consent, and defendant refused consent to a requested extension. In the course of litigation it was declared that the contract was in violation of the antitrust laws. In a later action plaintiff claimed that "by reason of the enforced delay [in the extension of the plant] it suffered damages * * * caused by the increased cost of construction, the increased cost of financing, the loss of earnings and the expense of litigation" (p. 133). A summary judgment for the defendant was affirmed; the delay in making the plant extension was plaintiff's own act. While the court expressed its reasoning in terms of *pari delicto*, the result, we think, could have been better expressed in terms of *volenti non fit injuria* or causation. The reasoning of the court, moreover, shows that it is a vast overstatement to say that *pari delicto* has no place in the antitrust field. *Pari delicto* does apply where at the very time of the alleged damage the plaintiff and defendant are parties to the very illegal agreement on which the suit is based. The court said (pp. 133-34):

> "We are in accord with the * * * District Judge * * * that Penn Water is precluded from recovery in this case because it was a party to the illegal agreement upon which it now bases its claim to recover under the anti-trust acts. Penn Water contends that the doctrine of *in pari delicto* is no longer a defense to a private action for damages growing out of an anti-trust violation but has been rejected by the recent decisions of the Supreme Court in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219

* * * *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, * * * and *Moore v. Mead Service Co.*, 340 U.S. 944 * * *.

"We do not so understand these decisions, *for in none of them were the plaintiff and the defendant parties to the same illegal conspiracy or agreement on which the suit was based.*

"We are satisfied that it was not the intention of the Supreme Court to overrule the doctrine firmly established in earlier cases."

In *Davidson v. Kansas City Star Company*, 202 F. Supp. 613 (W.D. Mo. 1962), plaintiffs, independent contractors for delivery of newspapers, contracted with the Kansas City Star to deliver its paper and agreed not to sell or deliver the papers of others. They were denied recovery of damages, for their refraining from delivering papers of others was their own act.[74]

Assuming that the consignment arrangement was unlawful, Simpson could *not* have been compelled to charge prices he did not desire. He exercised his volition to charge those prices. We know, of course, his excuse, that he did so because he feared Union would not renew his lease when it expired. But this is not a valid retort. As we show in Part B (pp. 89 et seq., infra), Union was under no duty to deal with him. If he elected to adhere to the consigned prices, he did it for what he thought was greater advantage to himself, and the act was still his free act. See *Philco Corp. v. Radio Corp. of America*, 186 F. Supp. 155, 162 (E.D. Pa. 1960).

74. See also *Louisiana Petroleum Retail Dealers, Inc. v. Texas Company*, 148 F. Supp. 334 (W.D. La. 1956), and *Temperato v. Horstman*, 321 S.W.2d 657 (Mo. Sup. Ct. 1959). Denying damages to one of the parties to a vertical price fixing agreement illegal under the state antitrust laws, the court said (p. 666):

"* * * we shall not permit the active participants in a forbidden contract to recover damages, treble or otherwise, against the other party on account of the very act of illegality in which they themselves have engaged."

2. IF THE CONSIGNMENT AGREEMENT WAS ILLEGAL, THE GASOLINE WAS STILL UNION'S PROPERTY AND SIMPSON HAD NO RIGHT TO SELL IT AT ALL.

There is another obstacle to recovery. A declaration by a court that an arrangement existing between the parties is illegal does *not* create a *different* agreement between them. A court may outlaw a contract, but it cannot supplant it by another of its own creation, which the parties did not make. If denied the right to market its gasoline by consignment, Union would still be free to decide what dealers it might wish to sell to, to decline to sell to any particular person or to any and all, and instead to sell to the consumers through its own employees. As for any gasoline entrusted to Simpson, he would merely have been in possession of *Union's gasoline* without any right of disposition whatever.

Nor can this fatal objection to recovery be obviated by treating the consignment agreement as one of sale and purchase, for the contract states no purchase price payable by the dealer to Union. The only way damages could be calculated would be by finding the margin between the price at which a dealer could resell and the price at which he could buy. But there was no price at which Simpson bought or could buy. This leads to a third obstacle.

3. THE FACT OF DAMAGE IS SPECULATIVE.

The gist of the foregoing discussion is that Simpson suffered no damage caused by any illegal act of Union. An additional deficiency is that the *fact* of damage is purely speculative. While great leeway is given a plaintiff in an antitrust suit in proving *amount* of damage, *no room for speculation is permitted* in establishing the *fact* of damages. *Flintkote Company v. Lysfjord*, 246 F. 2d 368, 392 (9 Cir. 1957), cer. den. 355 U.S. 835, and there must be a rational basis for approximating an amount, as shown by Judge Friendly's lucid opinion in *Hermann Schwabe v. United Shoe Machinery Corp.*, 297 F.2d 906 (2 Cir. 1962), cer. den. 369 U.S. 865.

The claim for $1000 is based on the assumption that during his dealership with Union Simpson could have sold the same amount of gasoline as he did at higher prices, and it rests on a computation entitled "Supposing I Could Have Increased My Margin ½¢ Premium and 1¢ Regular," arrives at $1,034.02 (see p. 10, supra). This "supposing" is pure conjecture; it is rank speculation that he could have increased his return by charging either more or less than he did. Profits depend on many factors; the quantity sold is as important as the price charged. An increase in price may mean a decrease in volume; lower per unit price may mean greater profit, not less. Striking the right price is the art of merchandising. A jury may not become the "merchandiser" retroactively and speculate what prices, day to day, would have been most productive or "suppose" whether Simpson's "margin" could have been increased.

The claim is pure guess. Simpson testified (R. 316):

"Q. Then you would have charged a penny a gallon more for each grade of gasoline than you actually did?

"A. *Possibly.*

"Q. Well, would you or wouldn't you have?

"A. I didn't have the opportunity.

"Q. If you had had the opportunity, what would you have done?

"A. *That is guessing.*"

No decided case supports the recovery sought. Where, by conspiracy, one has been wholly deprived of a source of supply of goods or denied access to the customers, the fact of some damage follows, albeit the amount may be problematical. This is the kind of situation with which the cases ordinarily deal. But the fact that a given resale price is required (if it be a resale price) has not the slightest tendency to show that, were it not required, the reseller could sell at a different price, or, if so, make a different profit. *Dehydrating Process Co. v. A. O. Smith Corp.*, 292 F.2d 653 (1 Cir. 1961), cer. den. 368 U.S. 931.

B. Simpson may not recover damages for Union's refusal to give him a new lease: the claim for $150,000.

Simpson's second claim of damages—for $150,000—is that he was unable to obtain a lease from Union. While he includes, in this sum, damage from inability to sell "his proprietary interest as a lessee" to a successor of his own choosing or to sell his "good will" or to obtain the fair market value of "his business", these are but another way of phrasing the claim that he had a proprietary interest as lessee despite the expiration of his one year lease (p. 11, supra). The cardinal fact here is that the cause of this item of "damage" was *not* the consignment agreement or lease, however illegal they are assumed to be, but simply Union's refusal to give a new lease.

It is elementary that a plaintiff cannot recover under the Sherman Act except for deprivation of "a legal right". *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 163 (1922); *Maltz v. Sax*, 134 F.2d 2 (7 Cir. 1943), cer. den. 319 U.S. 772. One cannot recover damages in an antitrust case for deprivation of something he does not own. *Steiner v. 20th Century-Fox Film Corp.*, 232 F.2d 190, 193 (9 Cir. 1956); *Whiteley v. Foremost Dairies, Inc.*, 151 F. Supp. 914, 924, 925 (W.D. Ark. 1957), aff'd 254 F.2d 36 (8 Cir. 1958). Unless Union was under a legal duty to lease to Simpson for some period of time, that is, unless Simpson had a legal right to continue to possess Union's property, he can recover nothing for its refusal to do so.

State law governs the right to an estate in real property, and on the expiration of his one-year lease, Simpson had no right in California law to a further estate. This very issue of whether Simpson had any right to tenure is *res judicata*, because in Union's unlawful detainer action against Simpson in a California State court judgment was entered adjudicating that at all times after midnight May 22, 1958, Union was entitled to possession of the property (see p. 7, supra). The alleged right to continue in possession was the

very issue in the state action. That judgment estops Simpson from claiming any such right now. *F. L. Mendez & Co. v. General Motors Corporation*, 161 F.2d 695 (7 Cir. 1947), cer. den. 332 U.S. 810; *Singer v. A. Hollander & Son*, 202 F.2d 55 (3 Cir. 1953); *Williamson v. Columbia Gas & Electric Corp.*, 186 F.2d 464 (3 Cir. 1950), cer. den. 310 U.S. 639. While the judgment of the State Court neither could nor did decide any federal antitrust questions, it is conclusive on the parties in this case that, under state law Simpson had no right to further possession, tenure or estate. That is part of the factual subject matter on which the federal antitrust law must operate.

The essential question, therefore, is whether federal antitrust law somehow imposed on Union a duty to do what State law did not require, viz., to lease its property to him for a further term after May 22, 1958. What Simpson seeks is more than a declaration that his consignment contract was illegal. *That* is a moot issue, for that contract has been dead and past since May 1958. By seeking damages he seeks a substitute for retroactively compelling Union to lease to him. This it could not be compelled to do, whatever its reason for refusal may have been.

There is a simply enormous body of law that one who is in the business of selling merchandise may discontinue selling to another for any reason whatever. Even if Simpson here had *owned* his own place of business and had been *buying* gasoline from Union, and Union had then refused to sell him further, that body of law would deny him recovery of damages. As said in *Schuting Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899, at 902 (D. Md. 1956), affirmed on the opinion of the District Court in 239 F.2d 176 (4 Cir. 1956), cer. den. 355 U.S. 823, a Sherman Act case involving a refusal to renew a dealer's one year contract:

> "* * * unless his contract so provides, a dealer once appointed has no tenure, no right to renewal of his contract" (p. 903).

The *Schwing* case was followed in *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957), cer. den. 355 U.S. 822 (1957), where the contract was also for one year, with no option of extension, despite "the custom in the business to extend contracts, from year to year, 'barring some reason for cancellation.' " (243 F.2d at 419.)

But even were courts to begin to whittle away at the settled body of law that one can discontinue *selling* to another for any reason, Simpson could not recover, for *here the question is whether one can be compelled to lease real property to another.* We submit that the Court of Appeals was correct when it said "* * * courts may not fashion a new lease for Simpson * * *. Simpson's tenure ended on May 22, 1958" (R. 570). **Suppose, when Simpson first sought a lease from Union in 1957, he had declined to accept a consignment arrangement and so was denied a lease. Could he have compelled Union to lease the property to him on a theory that consignment was illegal, or could he have sought damages for refusal of Union to lease to him? Obviously not!** Certainly his rights were not enlarged by the fact that he did enter into the consignment arrangement for a space of time. He did not thereby acquire a right to still further leases.

The fact that Union's reason for refusing to give Simpson a new lease was his unwillingness to follow price direction, as shown by his past conduct, is irrelevant. Much has been written about the *Colgate* doctrine, but, no matter how confined it has been, the last word on the subject is *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), and that case recognizes this principle as basic: Absent monopoly, one party may unilaterally refuse to deal with another for failure of that other to follow a course of conduct which it would be illegal to bind him to by mutual agreement. In the *Parke Davis* opinion this Court repeatedly recognized that a manufacturer may legally *refuse to have business relations* with one who fails to sell at prices satisfactory to or suggested by the

manufacturer, and that he may so inform the buyer.[75] The Court recognized that Section 1 of the Sherman Act is cast in the form of prohibitions of certain *means and methods*, viz., conspiracy, having certain economic consequences, but does not prohibit the consequences themselves when not achieved by the prohibited means. Thus, it said (p. 44):

> "The Sherman Act forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as *Colgate* is not overruled, this result is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of the manufacturer's right 'freely to exercise his own independent discretion as to parties with whom he will deal.'"

The manufacturer may rely on the individual self interest of another in avoiding termination of business relations, to bring about acquiescence in its policy (p. 47). There are writers who would like to see the Court go beyond *Parke Davis* and limit *Colgate* even further by holding that if, in consequence of the manufacturer's announcement, a vendee does acquiesce in its policy and conform to it, an "agreement" is thereby formed.[76] But even these writers acknowledge that if the manufacturer goes beyond the announcement to an actual refusal to deal, there is no violation of the antitrust law, for the self-evident reason that "the re-

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75. E.g., the passages quoted at pp. 63, 64, supra.

76. The Court did not so hold in *Parke Davis*. As said in a recent decision of the Ninth Circuit, *Walker Distributing Company v. Lucky Lager Company*, 1963 Trade Cas. ¶ 70,886 (Sept. 1963), "We feel obliged to assume that the report of the demise [of the *Colgate* doctrine] is premature." (p. 78,562)

fusal indicates that there has been a failure to obtain agreement."[77]

The cases are therefore numerous and uniform that one may legally refuse to deal with another, even though his reason is that other's refusal to enter into an unlawful agreement. *Leo J. Meyberg Co. v. Eureka Williams Corp.*, 215 F.2d 100 (9 Cir. 1954), cer. den. 348 U.S. 875 (1954). In *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5 Cir. 1952), cer. den. 345 U.S. 925 and *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5 Cir. 1954), cer. den. 348 U.S. 821, the defendant refused to deal further with the plaintiff because the latter refused to accede to demands not to handle competitive merchandise. In the *Nelson* case, the court said (p. 915):

> "There is nothing whatever in the Act to suggest that it covers a situation where the manufacturer refuses to make a sale or enter into a contract, and it has been stated time and again that a manufacturer has the unquestioned right to refuse to deal with any one for reasons sufficient to himself."

In the *Hudson* case, the court points out (p. 274):

> "Plaintiff had no tenure, *no right to a renewal* of his contract as master dealer. Defendant, on the other hand, *had an absolute right either to renew or not to renew it*, and the exercise by it of that right did not, it could not form the basis of a suit under Section 15, even if the evidence had shown * * * that the defendant had done so only because plaintiff had refused to give up in the future his other agencies * * *."

In *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4 Cir. 1959), defendant, a nationwide distributor, refused to sell further to plaintiff retailers because they handled goods in competition with defendant's lines. Dismissal of the complaint was affirmed, the court saying:

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77. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. Law Rev. 655 (1962), particularly at 686 and 704.

"Generally speaking, the right of customer selection is sanctioned by both statute and case law. Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer *for any reason or with no reason whatever.* Thus, the courts have until now not held a seller liable in damages *for refusing to deal with one who is unwilling to enter into an unlawful vertical price agreement* or an exclusive dealing arrangement. * * *

* * *

"Neither in terms nor inferentially does the statute prohibit a unilateral refusal to sell. Its condemnations are directed against executed transactions of lease, sale or contract containing the forbidden condition, agreement or understanding. Quite correctly the District Court pointed out that a mere refusal by a manufacturer to deal with a retailer who will not confine his dealings to the goods of the manufacturer does not run afoul of the section. The cases are unanimous in this * * * [Citations omitted] [p. 337].

* * *

"* * * There is no dispute about the fact that it was Western Auto's policy to have its associated retail stores push its own products and that it frowned upon their handling of competing goods. Plainly enough Western Auto wanted its dealers to advance sales of its merchandise, and threatened with cancellation and actually cancelled dealers who patronized its competitors to an extent which it felt jeopardized the value to it of the franchises issued to associated stores. But * * * it exacted no agreement against the handling of competing merchandise." [p. 338]

Osborn v. Sinclair Refining Co., 286 F.2d 832 (4 Cir. 1960), cer. den. 366 U.S. 963, cited by Simpson (Br. 50) was a decision of the same court and the same judge as *McElhenney*. The plaintiff had been a dealer and lessee of defendant and had his lease cancelled. He sought damages, claiming that defendant engaged in an illegal tying arrangement. The District Court had held there was no tying agreement. The Court of Appeals held that

under the findings of fact there was, that it was illegal, and that "Osborn's failure to abide by this arrangement or condition contributed to the cancellation of his lease" (p. 840). It then expressly refrained from holding that plaintiff could recover damages and said (p. 840):

> "* * * there are questions concerning Osborn's recoverable damages. * * *
>
> "Since Sinclair-Sherwood had the right to cancel the lease at its yearly termination date, the problem arises whether the damages flowing from the cancellation are recoverable as damages resulting from the violation of the anti-trust laws. * * *
>
> "Of course, if Osborn sustained no damages that are properly recoverable, he has no cause of action."

Since "there [was] evidence in the record" of other items of damage (p. 840) and the District Court had not passed on any question whether there was recoverable damage, the Court of Appeals remanded the case for consideration of that question. Thereafter the District Court held that damages flowing from the cancellation were not recoverable. *Osborn v. Sinclair Refining Co.*, 207 F. Supp. 856 (D. Md. 1962).

In *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2 Cir. 1962), plaintiff sued for treble damages under Section 4 of the Clayton Act. The District Court issued a preliminary injunction requiring defendant to continue doing business with plaintiff during the pendency of the suit. Reviewing *Colgate* and *Parke Davis*, the Court of Appeals reversed, saying (p. 870):

> "* * * Assuming as we do that the proof warranted the inference that Simplicity's action was motivated by Materials' prosecution of the treble damage action, appellant has done nothing except exercise its right to terminate the contract in accordance with its terms. * * *
>
> * * *

"* * * Here, Simplicity and its customer voluntarily entered into a contractual relationship and agreed to transact business for a limited period of time. In the course of that business, Simplicity may have discriminated against Materials in violation of the Clayton Act * * *. Materials maintained that it did suffer an injury and it brought a treble damage action to compensate for it and to recover the statutory penalty. Meanwhile the initial term of the contract between Simplicity and Materials was about to expire. It is true that the contract was subject to automatic renewal, if no one desired to cancel. But, Simplicity, for reasons it thought sufficient, decided to terminate and gave the required contractual notice of such termination. [p. 871-72]

* * *

"Finally, we believe that the injunction cannot be sustained on the theory that Simplicity's refusal to deal constituted a tort. * * * In this connection, it generally has been held that 'fundamental assumptions in free business enterprise,' including the belief that 'each business enterprise must be free to select its business relations in its own interest,' may justify or excuse the act of one who causes harm to another as a collateral consequence of his refusal to continue a business relation terminable at will. 4 Restatement, Torts, § 762, and comments a, b and c; Green v. Victor Talking Machine Co., supra; at p. 382 of 24 F.2d; Prosser, Torts, § 107 (2d ed. 1955); 1 Harper & James, Torts, § 6.13, p. 521 (1956); and see cases cited in Handler, Cases on Trade Regulation (3rd ed. 1960), p. 272, n. 2."[78] (p. 872-73)

Alexander v. Texas Company, 165 F. Supp. 53, 62 (W.D. La. 1958), is directly in point. There plaintiff's service station lease was cancelled because he refused to sell gasoline at prices "fixed"

78. In *Bergen Drug Company v. Parke, Davis & Co.*, 307 F.2d 725 (3 Cir. 1962), the Third Circuit enjoined a defendant from discontinuing business with a plaintiff during pendency of suit brought under the Clayton Act, but it did so because the "gravamen of the main claim is * * * monopolizing and attempting to monopolize which, of course, is unrelated to the resale price maintenance policy involved in Colgate." (p. 727, 2d col.)

by the defendant. Granting a summary judgment for defendant, the court said that "Texaco's termination of plaintiff's lease was entirely lawful"; it "did not violate Section 1 of the Sherman Act because a *unilateral* refusal to deal is not inhibited" by Section 1, which applies only where there is a " 'contract, combination * * * or conspiracy' ". It did not violate Section 2 because no monopolization claim would hold up. Furthermore, "[p]laintiff has not alleged any recoverable damage proximately caused by the claimed Sherman Act violation" because the

> " 'damages he claims * * * are computed on the basis of alleged profits he anticipated realizing through continued operation of the service station over a three-year period. Necessarily, this assumes a legal right which did not exist, for by the terms of the lease defendant legally could have cancelled it at the end of any lease-year, as was done. Consequently, the damages he claims for this are purely speculative and are not founded upon any enforceable right.' "[79] (165 F. Supp. at 63.)

The essence of the matter is that Congress has not yet seen fit to make the manufacturer a public utility. As said in *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2 Cir. 1962), at 871:

> "Indeed, when Congress enacted the Clayton Act, it rejected a provision which would have prohibited arbitrary refusals to sell because it was being projected into a field of legislation 'untried, complicated and dangerous' [citing Sen. Rep. No.

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79. A California case under the State Antitrust Act, *A.B.C. Distrib. Co. v. Distillers Distr. Corp.*, 154 C.A.2d 175, 191, 316 P.2d 71, 81 (1957), is similar. Plaintiff sued for refusal of defendant to renew a distributorship the term of which had expired, and argued that several provisions of the distributor agreement were illegal. First declaring that the same principles governed State antitrust actions as federal, the court denied recovery, saying that it was immaterial whether provisions of the expired agreement were illegal as "designed to prevent plaintiff from purchasing and selling the products of other manufacturers, competitors" of defendant or as a punitive and unlawful covenant running with the goods.

698, 63rd Cong., 2d Sess. 44 (1914).] * * * we cannot justify through improper judicial 'interpretation' of a section of the antitrust laws what amounts to an extension of the remedies given by Congress under the Sherman and Clayton Acts."[80]

Directly in point is *Dart Drug Co. v. Parke Davis & Co.*, 1963 Trade Cas. ¶ 70,906 (D.D.C., September 27, 1963) where summary judgment was granted defendant.

Appellant's citations are not in point.

We have considered some of Simpson's citations above. The essence of the remainder on the subject is that they are cases either (1) of conspiracies to refuse to deal or (2) refusals of a monopolist to deal. Thus *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951), *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951), *Ford Motor Co. v. United States*, 335 U.S. 303 (1948), *Ramsay Co. v. Associated Bill Posters*, 260

80. The court, in the *Simplicity* case, also referred (in fn. 8) to its earlier decision in *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46, 48-49 (2 Cir. 1915), where it had said:

"We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern. 'It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice.' Cooley on Torts, p. 278. * * *

"Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. *We have not yet reached the stage where the selection of a trader's customers is made for him by the government.*"

U.S. 501 (1923), are all conspiracy cases. Where one refuses to deal with another in effecting a conspiracy, he is not exercising his own will but the will of the conspiracy, which is illegal. From the beginning this Court has consistently drawn the line between a unilateral refusal and a conspiratorial one. *Federal Trade Commission v. Raymond Bros.-Clark Co.*, 263 U.S. 565 (1924). The case of *A. C. Becken Co. v. Gemex Corp.*, 272 F.2d 1 (7 Cir. 1959), involved neither consignment nor refusal to lease property. It was a case of a wide horizontal conspiracy between Gemex, a manufacturer, and all wholesalers who purchased from it, not only to fix the price at which they would sell what they bought from it but to fix the prices at which each would sell "products competitive to the Gemex line" (p. 2).

In *Eastman Kodak v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), Eastman had acquired a monopoly of the goods in question and by refusing to sell to plaintiff had, in view of the monopoly, cut off all source of supply (see, e.g., pp. 368, 369). The right of one to refuse to deal does not exist in a monopoly situation, *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951),[81] because the refusal effectuates the monopolization, which is illegal.

THE DISTINCTION BETWEEN PRIOR LESSEES AND ONE IN SIMPSON'S SHOES

The Court of Appeals suggested, although it did not hold, that there might be a distinction between the case of one who had been a Union lessee before Union adopted the consignment method of marketing and the case of one like Simpson, who had not theretofore been a lessee but became one knowing that he

81. In the *Lorain* case the Court said:

"*In the absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

had to be a consignee (R. 571).[82] For the reasons discussed above we think that neither type of lessee has a right to recover damages for refusal of the landowner to give a new lease. But certainly the court below was right in denying recovery to one such as Simpson, who obtained a lease on certain conditions and then violated them. *The lessor here did not try to cancel the lease but patiently suffered the running of the term.* Neither law nor morals require that it then give a new lease.

But because of the suggested distinction between a lessee such as Simpson and previous lessees, Simpson's brief debates the question whether "consent" will bar a private suit for damage under the antitrust laws. No such general question, however interesting, is involved in this case or in the reasoning of the Court of Appeals. What Simpson consented to was the lease and consignment. But they did not cause the claimed damage. During their existence he could have repudiated them, if they were illegal. Even so, while repudiating them, he could not continue to exercise rights he had acquired from them, as shown by the reasoning of *Ring v. Authors League of America*, 186 F.2d 637 (2 Cir. 1951) (Learned Hand, J.), cer. den. 341 U.S. 935. Ring was denied damages on the ground that he had no interest in the property he claimed, for the reason that "the contract, by which he obtained whatever interest he did obtain, was unlawful because it was part of the unlawful conspiracy" (p. 641):

> "The plaintiff repudiated it for that reason; but he was not free to repudiate it in part, keeping the right to 'produce,' and rejecting the conditions which the authors had imposed

82. The Court said:

"Simpson is therefore not in the position of lessees who had been operating stations under leases from Union and who may or may not have been forced or compelled to sign a consignment agreement as a condition for renewal of their lease. * * *

"* * * We do not pass on the question as to these lessees. But Simpson was coming into the leasing business fresh. He had no former lease agreement."

upon their promises * * *. It follows that the judgment was right in holding that the plaintiff had no interest in the play, if we assume that the 'Agreement' was part of an illegal combination or conspiracy * * *." (p. 642)

Simpson's business as a dealer was created by the very documents he now challenges as illegal. *Until the lease and the consignment agreement he never was, and without them he never would have been, a Union dealer.* As observed in *Walder v. Paramount Publix Corp.*, 272 F.2d 349, 351 (2 Cir. 1959), cer. den. 362 U.S. 952:

> "Thus the present plaintiffs complain that the very acts which created their corporation have also injured it, a difficult position for the trustees here to maintain successfully."

It would be one thing to say that consent does not bar damage inflicted. It would be quite another to say that, while successfully repudiating an arrangement on the basis of illegality, one can nevertheless keep it alive for its specified duration for such advantage as it offers him. The rationale of the *Ring* decision is that one may not voluntarily put himself into a position or relation, then claim it to be illegal and yet insist on having continuing and subsequent rights to operate under it. *But Simpson's case is even weaker than that.* Here the duration of the lease and consignment ended by their terms and the efflux of time. Simpson cannot claim a right to a new lease by virtue of the fact that for a season in the past he had been a Union dealer solely by force of a now expired lease and agreement which he now claims were illegal. This, we submit, is self-evident.

IV.

THE REQUISITE INTERSTATE COMMERCE OR EFFECT THEREON IS ABSENT

Unquestionably Union engages in interstate commerce. Since service stations in states other than California sell Union's gasoline on consignment, the necessary jurisdiction would be present in a suit by the Attorney General and, doubtless, in a suit by a service station dealer in another state.

But that is not the question here. The fact that a defendant engages in interstate commerce does not mean that everything it does falls within the federal jurisdiction in an antitrust suit. *Page v. Work*, 290 F.2d 323 (9 Cir. 1961), affirming a summary judgment for defendants in a private antitrust case for lack of jurisdiction.

The federal antitrust laws attach, indifferently, to activities that affect interstate commerce even though the activities are purely local, and to interstate activities despite the fact that the impact is purely local. But here both the impact and the activities causing the impact were purely local. The pertinent issue on interstate commerce in this case is whether the acts *injuring Simpson* were either in or affected interstate commerce. His operations were not in interstate commerce, for the operation of a retail service station is local. Pursuant to contracts made in California, between two citizens of California, Simpson leased a parcel of California real estate. No interstate commerce is involved in real estate. *United States v. Real Estate Boards*, 339 U.S. 485, 488 (1950), and a refusal to lease real property is not an act in interstate commerce. Union delivered to the leased premises gasoline refined in California which had never been outside California (R. 38). This gasoline was then sold at retail in California. Simpson's station sold 12,500 gallons per month (R. 322), a microscopic quantity when compared even with such a small area as Fresno, where over 3.5 million gallons were sold monthly (R. 16). Such

activities have no effect whatever on interstate commerce. Directly in point is *Alexander v. The Texas Company*, 165 F. Supp. 53, discussed at pp. 96, 97, supra, where defendants' motions for judgment were granted, and the court said (pp. 62-63) that there was no " 'showing that (Texaco's) lease cancellation affected interstate commerce in any degree.' "

CONCLUSION

We respectfully submit that the judgment is correct and should be affirmed.

Dated: San Francisco, California, October 23, 1963.

MOSES LASKY
Attorney for Respondent

(Appendix follows)

Appendix

STATUTES INVOLVED IN ADDITION TO THOSE QUOTED IN APPENDIX A TO PETITIONER'S OPENING BRIEF

McGuire Act, 66 Stat. 631 (1952), 15 U.S.C. § 45(a)(2) and (3):

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

California Fair Trade Act, Cal. Bus. & Prof. Code:

§ 16900. **Short title.** This chapter may be cited as the Fair Trade Act.

§ 16901. **Producer; commodity.** As used in this chapter:

(a) "Producer" means grower, baker, maker, manufacturer or publisher.

(b) "Commodity" means any subject of commerce.

§ 16902. **Contracts fixing sale price; exception.**

(a) No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others violates any law of this State by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at price stipulated by the vendor.

(2) That the vendee or producer require the person to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

(b) Such provisions in any contract imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

§ 16903. **Commodities sold through vending equipment.** All the provisions of this chapter extend to any commodity sold through vending equipment, if such vending

equipment bears the trade-mark, brand or name of the producer or owner of the commodity and if the commodity is in fair and open competition with commodities of the same general class produced by others.

§ 16,904. **Cut-price sales; unfair competition.** Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

§ 16,905. **Exclusions.** This chapter does not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

California Petroleum Labeling Act, Cal. Bus. & Prof. Code:

§ 20840. **Sale, etc., of petroleum products from unlabeled containers, etc., unlawful: Viscosity rating: Determination: Containers with net content of gallon or less.** It is unlawful for any person to sell, offer for sale, assist in the sale of, permit to be sold or offered for sale, or deliver or offer for delivery, any gasoline, distillate, kerosene, or any oil represented as lubricating or motor oil for internal combustion engines, at any place where petroleum products are kept or stored for sale, unless and until there is firmly attached to or painted upon each container, receptacle, pump, and inlet end of the fill-pipe of each underground storage tank, from which or into which such gasoline or oil is drawn or poured out for sale or delivery, a sign or label plainly visible consisting of the word or words in letters not less than one-half of an inch in height, 'gasoline,' 'distillate,' 'kerosene,' 'lubricating oil' or 'motor oil,' as the case may be, together with the brand, trade-mark or trade name of such product * * *.

§ 20849. Filling of tanks, pumps, containers, etc., with, or delivery of, product other than indicated by brand, trademark, etc. It is unlawful for any person to deposit or deliver, or authorize to be deposited or delivered, into any tank, pump, container or receptacle, or into any bottle or bottles kept in a basket, stand or rack, at any place where petroleum products are kept or stored for sale, any gasoline or other motor fuel, or any distillate, kerosene, lubricating oil or motor oil, other than that indicated by the brand, trademark, trade name, and in the case of lubricating oil or motor oil, the S.A.E. classification number, displayed on the tank, pump, container, receptacle, bottle, basket, stand or rack, or the inlet end of the underground storage tank, except as provided in this chapter.

§ 20850. Same: Connection of pump, etc., bearing particular label with receptacle containing another product. Subject to the provisions of this chapter relating to tank vehicles, it is unlawfuf for any person to attach or connect, or cause or permit to be attached or connected, any pump, container or other device, used for or in the drawing, pouring, or delivery of any petroleum product referred to in this chapter, and intended for sale, to or with any tank or receptable containing any petroleum product or any liquid other than the one described on the label, tag or sign attached or affixed to such pump, container or other device.

§ 20851. Same: Delivery of product other than that indicated by label on pump, etc. Subject to the provisions of this chapter relating to tank vehicles, it is unlawful for any person in making any sale, to pump, draw, furnish or deliver, or to cause or permit to be pumped, drawn, furnished or delivered, by means of, or through, any pump or other device, any product other than the one described on the label, tag or sign attached or affixed to such pump or other device.

Cal. Civil Code § 2026. FACTOR, WHAT. A factor is an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser.

Cal. Civil Code § 2027. OBEDIENCE REQUIRED FROM FACTOR. A factor must obey the instructions of his principal to the same extent as any other employe, notwithstanding any advances he may have made to his principal upon the property consigned to him, except that if the principal forbids him to sell at the market price, he may, nevertheless, sell for his reimbursement, after giving to his principal reasonable notice of his intention to do so, and of the time and place of sale, and proceeding in all respects as a pledgee.